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IN THE

Supreme Court of the United States

October Term, 1982

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs.

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

THOMAS J. HART
Counsel of Record LIPPMAN & HART
Suite 220, 1801 K. Street, N.W.
Washington, DC 20006
(202) 467-6520

PETER P. PARAVATI, P.C.
Attorneys for Petitioners
217 Rutger Street
Utica, NY 13501-3687
(315) 735-6481

Of Counsel
PETER P. PARAVATI
CONSTANCE J. ANGELINI

The employee attained normal retirement age upon the 10th anniversary of his participation in the pension plan, but did not have 10 years of service under the plan. The plan denied the employee any benefits because the employee did not meet the plan's vesting requirement of 10 years of service. The Court of Appeals for the Second Circuit held that §203(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1053(a) requires the plan to vest the employee in his accrued benefits solely upon the attainment of normal retirement age.

Questions Presented.

1. Whether the first clause of ERISA's minimum vesting provision (§203[a]), which incorporates the requirement that normal retirement age occurs upon an employee's 10th anniversary of participation, should be read (a) as an independent ground for vesting, or (b) as part of the ERISA provision (§203[a][2]) requiring vesting upon the completion of 10 years of service?

2. Does the term "10th anniversary" incorporated in the minimum vesting provision refer to (a) 10 years of service for which contributions have been made on behalf of the employee, or (b) 10 years of time following the employee's entry into the plan regardless of service or contributions?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982.

No. 82-

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T.E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of The New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs.

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI.

The New York State Teamsters Conference Pension and Retirement Fund, T.E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees

of the New York State Teamsters Conference Pension and Retirement Fund petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Second Circuit entered on October 6, 1982.

Opinions Below.

District Court.

A Decision and Order was issued by the district court, Chief Judge John T. Curtin, which denied plaintiff's motion for partial summary judgment and granted defendants' motion for summary judgment. Judge Curtin dismissed plaintiff's cause of action which alleged that the defendants violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* (ERISA). The Decision and Order (A-17), is not officially reported. Pursuant to the Decision and Order, judgment was entered on August 17, 1981 (A-24).

Court of Appeals.

On October 6, 1982, the Court of Appeals for the Second Circuit reversed the judgment of the District Court. The opinion of the Court of Appeals (A-1) is reported at 691 F. 2d 74 (2nd Cir. 1982).

Jurisdiction.

The decision of the Court of Appeals was entered October 6, 1982 (A-28). The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved.

1. Sections 2, 3(22), 3(23), 3(24), 202(a)(1), 202(a)(2), 203(a), 203(b)(2)(A), 204(b)(3)(A), and 206(a) of the Employee Retirement Income Security Act, 29 U.S.C. §§1001, 1002(22), 1002(23), 1002(24), 1052(a)(1), 1052(a)(2), 1053(a), 1053(b)(2)(A), 1054(b) (3)(A), and 1056(a) are reprinted at A-35 to 40 of the appendix to this petition.

2. Section 411(a)(8) of the Internal Revenue Code, 26 U.S.C. §411(a)(8) is reprinted at A-48 of the appendix to this petition.

Statement of the Case.

On October 6, 1982, a three-judge panel[1] of the United States Court of Appeals for the Second Circuit reversed a district court judgment which had denied Clara Duchow's request for a declaration of entitlement to pension fund benefits under the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (ERISA). The court of appeals, in reversing, held that ERISA requires that pension benefits become vested upon an employee's attainment of "normal retirement age," as defined in the Act, and that Clara Duchow was entitled to pension benefits, both as an individual and as Administratrix of the estate of Herman Duchow. The court remanded for entry of partial summary judgment in favor of plaintiff and for a determination of the amount of benefits. The New York State Teamsters Conference Pension and Retirement Fund, T.E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler

[1]Circuit Judges Mansfield and Kearse; District Judge Cabranes, United States District Court for the District of Connecticut, sitting by designation.

Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund ("the Fund"), petitioners, seek review of the court's decision.

General Background.

Herman Duchow became an employee of Southland Frozen Foods, Inc. ("Southland"), on September 1, 1963. Subsequently, Southland entered into a collective bargaining agreement with Local No. 558 of the International Brotherhood of Teamsters. On February 1, 1969, Duchow became a member of the pension plan ("the Teamsters Plan") established by the Fund. In February of 1977, at the age of 69, Duchow applied to the Board of Trustees of the Fund for pension benefits. His application was denied. On May 31, 1977, Duchow terminated his employment with Southland. He thereafter returned to Southland and was employed there in January and February of 1979. During this period, Duchow reapplied for pension benefits. This application, too, was denied.

In denying Duchow's applications, the Trustees took the position that Duchow had no vested pension rights because he had not fulfilled the Teamsters Plan's service requirements. They relied on Teamsters Plan provisions that, in order to receive pension benefits, an employee must have attained either

(a) Age 60 with 15 or more years of past and future service combined, or

(b) Age 65 with 10 or more years of future service.

Although Duchow was over the age of 65, he concededly met neither of the Teamsters Plan's alternative requirements with respect to periods of service, in that he had acquired 5.4 years of past service and 8.9 years of future service.

An action was commenced by Herman Duchow in 1979. The district court's jurisdiction was predicated on §502 of ERISA (29 U.S.C. §1132) (A-31). Upon his death, plaintiff, Clara Duchow, as his Administratrix and widow, was substituted for him (A-26). She sought to recover for benefits to which Duchow was entitled during his lifetime, as well as benefits to which she was personally entitled. Her entitlement to survivor benefits depended on the eligibility of Herman Duchow to receive benefits. The district court granted summary judgment in favor of the defendants, petitioners herein, on the ground that Duchow had not met the Teamsters Plan's service requirements. The plaintiff appealed the district court's decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed the district court in a decision by Judge Amalya Kearse.

The Decision of the District Court.

The district court determined that since Herman Duchow failed to satisfy the 10 year service requirement under the Teamsters Plan, he was not entitled to receive pension benefits from the Fund (A-23). Therefore, the court held Duchow's widow was not entitled to survivor benefits. In reaching this conclusion, the court rejected plaintiff's argument that §203 of ERISA, 29 U.S.C. §1053, contains two separate vesting requirements, the first (§203[a]) requiring the nonforfeitability of benefits upon normal retirement age regardless of the plan's service requirements, and the second (§203[a] [2]) providing

for preretirement vesting according to schedules set out in the statute. The court found that the case of *Caterpillar Tractor v. Commissioner,* 72 T.C. 1088 (1979), upon which plaintiff had relied, was distinguishable in that it concerned a plan which provided for a mandatory retirement age, thereby effectively preventing the vesting of rights in employees hired at age 57 or older. In *Caterpillar,* the tax court held that the mandatory retirement provisions of the plan under review violated that part of §203(a), providing that,

> . . . an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . .

The district court concluded that since the Teamsters Plan did not prohibit Mr. Duchow from continuing to work until he had attained sufficient service credit for vesting, the Teamsters Plan was not violative of §203(a).

The Decision of the Court of Appeals.

The court of appeals reversed the judgment of the district court. The court's decision was based on its interpretations of statutory language, legislative history, and the declared purposes of ERISA. The court of appeals determined that both the format of §203(a) and the disparate contents of its conjoined parts indicate that two distinct vesting requirements are imposed (A-8). The court also determined that the legislative history indicated a Congressional intent to preserve already existing vesting rights, and that Congress believed that vesting of accrued benefits on retirement age regardless of length of service was a benefit already enjoyed by employees (A-9). Finally, the court found that the imposition of two distinct vesting

requirements is consistent with the purpose of ERISA, i.e., to protect beneficiaries by reducing the risk of loss of pension benefits (A-10). In construing that part of the definition of "normal retirement age," referring to a participant's "10th anniversary . . . in the plan" the court found that no service requirement was intended to be imposed. The court concluded that Duchow became entitled on the tenth anniversary of the commencement of his participation in the Teamsters Plan to receive whatever pension benefits he had accrued by virtue of his years of participation in the Teamsters Plan (A-15). The court cited in footnote 3 (A-12) three tax court decisions which reached the same conclusion in interpreting a substantially identical counterpart provision in the Internal Revenue Code, 26 U.S.C. §411(a) (1976); *Trustees of the Taxicab Industry Pension Fund v. Commissioner* (1981), T.C.M. (CCH), Para. 651; *Board of Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund v. Commissioner* (1981), T.C.M. (CCH), Para. 597; *Caterpillar Tractor Co. v. Commissioner*, 72 T.C. 1088 (1979).

Reasons for Granting the Writ.

The Employee Retirement Income Security Act enacted in 1974 (ERISA) established a comprehensive and complex federal regulatory scheme governing private retirement pension plans. It was passed in order to reduce the number of pension benefits lost, and to curb abuses of such plans. See *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 362 (1980). It was also designed to assure the financial soundness of pension plans. ERISA §2(a), 29 U.S.C. §1001(a).

The court of appeals' decision requires that a participant's accrued benefits become nonforfeitable upon

reaching normal retirement age without regard to length of service (A-12). In the instant case, this means that Herman Duchow's right to a pension vested on his normal retirement age, which he reached on the 10th anniversary of the date he commenced participation in the Teamsters Plan, even though he had only 8.9 years of vesting service credits (A-14). The Teamsters Plan, in compliance with the minimum vesting requirements set forth in §203(a)(2), 29 U.S.C. §1053(a)(2), requires 10 years of service for vesting. In eliminating this service requirement, the court of appeals has eviscerated the vesting standards of the Act, insofar as they apply to older employees who are nearing retirement age.

The court of appeals has effectively created two vesting standards: one, which is extremely generous, is to be applied to retirement age employees, and the other, which is far stricter, is to be applied to younger workers. This duality was neither intended by Congress, nor is it permitted by statute. The Teamsters Plan has always operated on the assumption that it is required to pay pensions to individuals with vested rights, as determined under the Teamsters Plan in compliance with the statute, and that vesting is directly related to periods of service. Since the decision below literally means that pension benefits must be paid to individuals on attaining normal retirement age, whether they have one year of service or several, even if they have no vested rights under the "preretirement" vesting standards set forth in §203(a)(2), pension funds such as the Teamsters Plan will be forced to make enormous outlays in benefits which have not been planned for or contemplated. The decision will have a deleterious effect on the actuarial soundness of the Fund and many other funds, and will, therefore, defeat the purpose of federal pension legislation.

The decision below will require a change in the Teamsters Plan benefit formula and a lowering of benefit levels which will harm all pensioners. It will inevitably lead to employment discrimination against older workers, inasmuch as employers will be reluctant to hire mature workers whose benefits may vest after very short periods of employment. Further, the court's construction of the law actually requires the Plan to discriminate against younger employees. The unfair impact of the decision may be illustrated in the ontext of this case. According to the court, Mr. Duchow's benefits vested after only 8.9 years of credited service, and his widow thus became entitled to survivor's benefits based on his years of service. A younger worker who terminates employment after 8.9 years of service is entitled to no benefits because he has not fulfilled the Plan's 10 year service requirement. It is incredible to view this kind of discrimination as within the intent of Congress. However, that is precisely the result permitted by this decision.

It is necessary, therefore, for this Court to determine the correct meaning of this important section of federal pension law in such a way as to promote the true intention of Congress. The specific deficiencies in the court of appeals' decision are set forth below.

POINT ONE.

Under basic concepts of statutory construction, the court of appeals erred in concluding that pension rights vest on normal retirement age without regard to length of service.

A. The court's decision requiring the vesting of accrued benefits on normal retirement age is contrary to the plain language of the statute.

The language of §203(a) supports the position that the vesting of penson rights is contingent upon the completion of a period of service. Section 203(a) provides for minimum vesting standards as follows:

> §203. Minimum Vesting Standards
>
> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

29 U.S.C. §1053(a). The statute provides that the *normal retirement benefit* must be vested upon normal retirement age, and further, that the normal retirement benefit (a term defined in the statute) shall satisfy the vesting requirements set out in paragraphs (1) and (2) of §203(a). Therefore, a pension plan is required to define its normal retirement benefit in terms of one of three alternative vesting standards set out in the statute and it must provide that the benefit thus determined is nonforfeitable upon normal retirement age. The statute also requires that an

employee's right in his accrued benefit derived from his own contribution must be nonforfeitable. §203(a)(1).

The Teamsters Plan has chosen the vesting provision contained in §203(a)(2)(A) which provides that:

> . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

29 U.S.C. §1053(a)(2)(A). The normal retirement benefit, therefore, as defined by the Teamsters Plan, presumes a 10 year period of service. The term "year of service" is also defined in the statute. §203(b)(2)(A). It means

> a calendar year, plan year, or other 12—consecutive month period . . . during which the participant has completed 1,000 hours of service.

29 U.S.C. §1053(b)(2)(A).

Petitioners' reading of the statute is supported by the definition of "normal retirement benefit" set forth in §3(22). It means

> . . . the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age . . .

29 U.S.C. §1002(22). Congress has authorized the Plan to define the normal retirement benefit subject to the minimum vesting requirements set out in §§ 203(a)(1) and (2). The Teamsters Plan having chosen the 10 year vesting provision permitted by the statute, logically requires that the attainment of the normal retirement benefit is contingent upon the completion of at least 10 years of service.

The concept of normal retirement benefit, therefore, presumes that rights have vested, and that those rights must be nonforfeitable on normal retirement age.

The court of appeals erroneously determined, based on legislative history read out of context that the term "normal retirement benefit" means "accrued benefit." Therefore, the court concluded that §203(a) requires that the accrued benefit be vested on normal retirement age without regard to length of service. "Accrued benefit" is also a defined term; it is that portion of a participant's retirement benefit that relates to his period of credited service. Though the accrued benefit is expressed in the form of an annual benefit commencing at normal retirement age (§3[23], 29 U.S.C. §1002[23]), it is not directly related to the concept of vesting. Vesting is not required for the accrual of benefits. In contrast, the accrual of benefits *is* required for vesting. The court's decision requiring that accrued benefits vest on normal retirement age is not supported by the language of the statute.

If Congress had intended that accrued benefits would vest on normal retirement age regardless of length of service, it would have said so. Congress drafted the definition section; it was well aware of the distinction between the two terms. As a matter of basic statutory construction, it is clear that the statute requires the vesting of the normal retirement benefit on attaining normal retirement age, and that the normal retirement benefit presumes the completion of 10 years of service, i.e., 10 years in which the participant has performed 1,000 hours or more of service in each year.

The court below interpreted §203(a) as imposing two independent vesting requirements in part because of one

sentence in the House and Senate Conference Committee Joint Explanatory Statement which states that under the new law:

> . . . all plans would have to meet the requirement of present law that an employee must be 100 percent vested in his accrued benefit when he attains normal or stated retirement age (or actually retires).

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 5038, 5050.

The court, therefore, concluded that §203(a) was designed to preserve rights already recognized by law and that in contrast, §203(a)(2) was solely concerned with the vesting of rights prior to retirement. Petitioners herein do not contest the proposition that Congress wanted to preserve in ERISA what it perceived to be already existing rights. The court erred, however, in presuming that Congress believed that under pre-ERISA law rights vested at retirement age *without regard to length of service.* Nothing in the legislative history suggests that Congress made such an assumption. The legislative history, in fact, leads to the opposite conclusion. In drafting the legislation, Congress' main concern was for the worker whose pension rights were lost because of the termination of employment prior to retirement age. The statute is clearly designed to create new vesting rights to prevent such losses. The law as it existed in 1974 allowed for reasonable service requirements as a prerequisite to vesting. *See* Revenue Ruling 69-421, 1969-2 C.B. 59. It was Congress' understanding that once an individual reached normal retirement age, had fulfilled service requirements and had not previously been divested through the operation of unreasonably harsh forfeiture

provisions, that pension benefits were not in jeopardy. The abuses which Congress intended to remedy occurred prior to retirement. Therefore, it does not follow that Congress, in intending to preserve rights already in existence, drastically altered the law to expand those vesting rights without explaining what it was doing. Since the legislative history is silent concerning Congress' understanding of service requirements, the court erred in viewing this silence as an expression of Congressional intent to modify them.

B. The definition of normal retirement age incorporates a ten year service requirement.

Though on its face §203(a) seems unrelated to any service requirement, the definition of normal retirement age contained in §3(24) permits a 10 year service requirement. Section 3(24) defines the term "normal retirement age" as the earlier of—

(a) the time a plan participant attains normal retirement age under the plan, or

(b) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. §1002(24).

Petitioners contend that that part of the definition which refers to the participant's "10th anniversary" of participation in the plan refers to the 10th anniversary of

the commencement of service as well as the commencement of plan membership. Therefore, an employee reaches normal retirement age when he reaches age 65, or completes 10 years of covered service, whichever occurs later. The court of appeals rejected this argument, preferring instead to read the term 10th anniversary literally as referring to a date rather than a period of service between that date and a past event (A-13). The court's construction results in vesting being hinged on years of *participation* in the plan rather than years of service. A year of participation is not necessarily equivalent to a year of service. As illustrated by the facts of the instant case, one may remain a plan participant and earn only partial service credit or none at all. Herman Duchow participated in the Teamsters Plan for 10 years, yet he only worked for 8.9 years. The court has concluded that these periods of time—participation unsupported by service—are to be counted toward vesting.

The court implies that for retirement age workers, the concept of a "year of service" as defined in the statute is irrelevant to vesting. Therefore, any amount of service—even one day—in each of 10 consecutive years culminating in retirement after 65 is sufficient for vesting. This reading of the statute is patently unreasonable. It could not have been intended by the same authors, who, for the purpose of benefit accrual, define a "year of participation" as

> a period of *service* . . . as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis. (emphasis added).

§204(b)(3)(A), 29 U.S.C. §1054(b)(3)(A).

Petitioners' contention that the 10th anniversary provision requires 10 years of service is entirely consistent with the legislative scheme to relate an employee's right to vested benefits to the completion of a period of service. The Report on the Senate's version of the bill clearly indicates an intent that vesting be service related. It states that

> The Committee bill takes the approach of being 'age neutral,' which means that *an employee's rights to vested benefits depend solely on his years of service,* rather than on some combination of service and age. (emphasis added).

Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U. S. Code Cong. & Ad. News,* 4890, 4931.

The position that the term 10th anniversary relates to a 10 year period of service is further supported by references in other sections of the statute and in the legislative history to the 10th anniversary concept. For example, §206(a), which deals with the form and time of payment of benefits, refers to "the close of the Plan year in which occurs . . . the 10th anniversary of the year in which the participant commenced participation in the plan." 29 U.S.C. §1056(a)(2). The House Ways and Means Committee Report dealing with this section of the statute explains that

> To insure that a participant can reasonably expect to receive his benefits during his retirement years, the committee bill requires a qualified plan (to which the basic vesting provisions apply) to commence payment of benefits to the participant . . . not later than . . . (2) the 10th anniversary of the

> time the participant commenced participation in the plan. . . . The second of the above alternatives (*the 10th anniversary of commencement of service*) is designed to permit a defined benefit plan to have an adequate period of time in which to fund the benefit for a person who first enters the plan at a relatively late age. (emphasis added).

H. R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U. S. Code and Ad. News,* 4670, 4735.

The committee also states that

> The '10th anniversary provision' was adopted to encourage the employment of individuals who are hired at mature ages for a long enough period to enable them to earn significant benefits under the plan. *Id.* at 4687.

This language in the legislative history is totally inconsistent with the court's thesis that vesting at normal retirement age is hinged on plan participation and is unrelated to service. The whole purpose of the 10th anniversary provision is to allow for the accrual of sufficient benefits so that those benefits may ultimately vest. It is reasonable to assume that the purpose of the 10th anniversary provision in §206(a) is identical to the purpose of the 10th anniversary provision in the definition of normal retirement age set forth in §3(24) and, therefore, incorporated in §203(a). It would indeed be an anomaly to ascribe to the same language in three related sections of the same statute contradictory meanings and purposes. However, the court of appeals' decision requires such a construction.

One of Congress' stated concerns in drafting this legislation was that it be age neutral, so as not to result in

discrimination against older workers. The legislative history reveals that the vesting of benefits on the basis of age was in fact considered by the drafters of the statute, but that it was rejected in favor of service related vesting provisions. The Senate Finance Committee Report dealing with this issue explains that

> For one thing the committee believes that such age related minimum vesting requirements would hamper older workers in their search for new employment because it would involve higher pension costs for them as compared with younger employees.

Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U. S. Code Cong. & Ad. News,* 4890, 4905.

The Report further notes that

> Age-weighted proposals have been advocated to the committee because they provide early vesting to the older worker. However, the committee believes this approach would tend to discourage the hiring of older employees, who already are faced with difficult problems in finding employment. *Id.* at 4931.

In a footnote, the committee clearly states that

> . . . the committee's decision on vesting *gives no direct effect to age.* (emphasis added). *Id.* at 4931.

The decision of the court of appeals is directly in conflict with the expressed intent of Congress. According to the court, the triggering event for vesting is the attainment

of normal retirement age without regard to years of service, and the definition of normal retirement age assumes no service requirement. We are forced, therefore, to conclude that the statute provides for vesting merely because of the passage of time. Such a conclusion is insupportable in the light of the clear legislative intent expressed in the committee reports.

The court of appeals, in its discussion of the issue of discrimination, points out that Congress dealt with this problem by allowing pension plans to exclude from participation persons within 5 years of retirement age. See §202(a)(2)(B). However, many pension plans, including the Teamsters Plan, have allowed the participation of older employees without regard to age, in reliance on what the plan trustees considered to be a reasonable 10 year vesting provision. In effect, any individual who can work 10 years is entitled to a pension regardless of age. The court of appeals' decision will require plans to exclude individuals within 5 years of retirement, and will obviously result in discrimination against workers who are more than 5, but less than 10, years away from retirement. Surely, such a result cannot be reconciled with the purpose of the statute and the intent of Congress as expressed in the legislative history. Therefore, the decision of the court of appeals must be addressed and rectified by this Court.

POINT TWO.

The decision of the Court of Appeals is inconsistent with the decisions of other courts which have interpreted the statute.

The instant case appears to be one of the first judicially construing the interplay between §§ 3(24) and 203(a).

However, each of these sections has been independently examined, and the understanding of other courts is inconsistent with the meaning ascribed by the Second Circuit court of appeals to these sections of the statute.

This Court has on two recent occasions discussed ERISA's vesting provisions, and has made no mention of unconditional vesting on retirement age. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1980), the Court stated that

> . . . Congress, through ERISA, wanted to ensure that 'if a worker has been promised a defined benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—. . . he actually receives it.' (citations omitted) For this reason the concepts of vested rights and nonforfeitable rights, are critical to the ERISA scheme.

This Court spoke to the issue of service related vesting at page 513, n. 10:

> Congress approved some delay in an employee's acquisition of a vested right to portions of his pension derived from employer contributions. Thus, *ERISA specifies that this right could be hinged on a minimum length of service* . . . That minimum period of service can be calculated under three different formulas . . . (emphasis added).

In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 366 at n. 10, this Court referred to §203(a) as

> . . . a central provision in ERISA. It requires generally that the plan treat an employee's benefits to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in §203(a)(2), as not subject to forfeiture.

Of course, in neither of these recent cases was this Court addressing the issue of whether §203 requires vesting on retirement age without regard to service. However, the total lack of any discussion of such a significant vesting requirement, coupled with unambiguous statements that vesting may be related to service, indicate that this Court was unaware of such a requirement, and implies that it does not exist.

Other courts which have considered the meaning of §203(a) have similarly failed to articulate or recognize a retirement age vesting requirement without regard to service. See for example, *Hernandez v. Southern Nevada Culinary & Bartenders Trust,* 662 F. 2d 617, 619-620 (9th Cir. 1981) ("ERISA's minimum vesting provisions require only that, once an employee-participant satisfies his pension plan's length of service requirements, his right to receive his vested pension benefits matures on his reaching the normal retirement age contained in the plan."), also *VanFossan v. International Brotherhood of Teamsters,* 649 F. 2d 1243, 1246 (7th Cir. 1981) (" 'an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and' . . . in the case of an employer contribution plan if an employee 'has at least 10 years of service . . .' "), also *Hepple v. Roberts Dybdahl, Inc.,* 622 F. 2d 962, 964-965 (8th Cir. 1980) ("Under the kind of plan involved in this case which

provides for 100 percent vesting of employer's contributions after 10 years of covered service, there is no requirement in the statute for vesting of any lesser percentage of benefits before the required 10 years of service.").

The Seventh Circuit Court of Appeals was recently called on to determine the meaning of §3(24) and the identical provision in the Internal Revenue Code, 26 U.S.C. §411(a)(8), both of which contain the definition of normal retirement age, in *Janowski v. Teamsters Local No. 710 Pension Fund,* 673 F. 2d 931 (7th Cir. 1982). That court assumes that the normal retirement age definition includes within it a 10 year service provision. According to the court, §411(a)(8) is to be read as defining normal retirement age as the earlier of:

(A) The time a plan participant attains normal retirement age under the plan or

(B) the later of the time a plan participant attains 65 *or accumulates 10 years of credited service.* (emphasis added).

673 F. 2d at 936.

The *Janowski* court reads §3(24) and §411(a)(8) precisely as the petitioners herein believe they should be read. The court notes that in enacting ERISA, Congress intended to increase the number of individuals participating in retirement plans, while at the same time, promoting the financial integrity of those plans. The court concludes that:

> Analyzing §411(a)(8) in this light, it is clear that Congress intended the trustees, as fiduciaries, to

> balance desired benefits against economic realities. For this reason, the statute authorized any normal retirement age subject to the limitations of 65 years or 10 years of service. *Id.* at 937.

This reading of the statute furthers Congress' goals since it encourages an employer to allow participation by older workers inasmuch as the employer is assured it will not incur liability for vested rights until a reasonable period of service has been completed. Also, the provision furthers the goal of promoting financial integrity by insuring that benefits will generally not be paid out until significant contributions have been accumulated.

Although the decision of the Second Circuit Court of Appeals is consistent with the reasoning of the three tax court cases which it cites in its opinion (A-12), there is an obvious tension between the circuits regarding the meaning of §203(a). The Seventh Circuit's understanding of the meaning of "normal retirement age" is certainly in conflict with that of the Second Circuit. The construction of §203(a) thus represents an issue of enormous practical significance, not only for the administrators and trustees of pension plans, but for millions of individuals who depend on such plans for retirement income. The instant case raises a question which is likely to recur until it is definitely settled by this Court. Thus, certiorari should be granted to decide an issue of great importance for the structuring and administration of pension plans, and to forestall probable conflict in the lower courts concerning this issue.

POINT THREE.

The purpose of ERISA is not served by the Second Circuit's decision.

The problems which Congress sought to rectify in enacting ERISA were complex and multifaceted. In the instant case, the court of appeals ignored this complexity and interpreted the statute in the light of one Congressional concern, albeit a significant one, to the exclusion of other concerns expressed in the statute and the legislative history. The inevitable result of such a narrow focus is an unbalanced and fundamentally inaccurate perception of the intent of Congress.

Congress intended in ERISA to enact "minimum standards . . . assuring the equitable character . . . and financial soundness" of employee benefit plans. It is the declared policy of the Act to protect the interests of plan participants by requiring such plans "to vest the accrued benefits of employees with significant periods of service." §§ 2(a), and (c), 29 U.S.C. §§ 1001(a), and (c). Thus, the statute and legislative history reveal that Congress intended to protect against the loss of pension benefits, to increase the number of individuals participating in pension plans, and to strengthen the financial integrity of such plans. The court of appeals focused narrowly on the goal of reducing the loss of pension benefits and ignored Congress' concern that vesting standards not be so burdensome as to result in the financial instability of, or the elimination of, pension plans. See for example, H.R. No. 93-807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code & Ad. News,* 4670, 4682.

A vesting standard which mandates the vesting of any and all accrued benefits on normal retirement age, without

regard to the completion of a period of service, is extremely burdensome and has far-reaching implications for the actuarial soundness of employee benefit funds. Such a standard requires that a benefit be paid even though the supporting employer contributions may be very small and have accrued little interest. Further, such a vesting standard requires a change in the Fund's actuarial assumptions. The Teamsters Plan has been structured so that employer contributions are made on all employees; all employees, therefore, become Teamsters Plan participants. The Fund assumes that not all the individuals who begin participation in the Teamsters Plan will actually vest and receive benefits, because out of several thousand participants, some will leave employment prior to the completion of 10 years of service. The contributions made on behalf of these people represent gains to the Fund because there is little likelihood that concomitant benefits will be paid based on those contributions. Such gains are necessary to the actuarial soundness of the Fund in view of the liabilities which the Fund incurs due to the requirements of ERISA. For example, the statute requires that credit must be given for periods of service with a participating employer even if that employer fails to make contributions on behalf of an employee. Credits given on this basis result in a loss to the Fund. The gains described above offset these losses and thus allow the Fund to meet the burden of ERISA's guarantees without jeopardizing the financial soundess of the Fund.

The Teamsters Plan as it is presently structured contemplates wide participation by employees which is consonant with the goal of federal law. The vesting standard required by the court of appeals will result in a narrowing of participation inasmuch as employers will seek to avoid the participation of older workers in order to reduce

the potential for underfunded liability for vested benefits. Therefore, in actuality, the decision of the court of appeals actually runs counter to the expressed intent of Congress and is not supported by the legislative history which demonstrates Congress' awareness of the problems which might be caused by an unduly liberal vesting standard.

Whenever interpreting an act of Congress, a court is charged with giving effect to the intent of Congress. The court of appeals' decision does not promote the overall goals of ERISA and may do substantial damage to pension funds.

Conclusion.

The proper accommodation of the various sections of the Employee Retirement Income Security Act at issue herein is obviously a question in respect of important matters of federal law which has a significant impact and, therefore, this Court should grant this petition, take jurisdiction of this case, and review the questions presented.

Respectfully submitted,

THOMAS J. HART
Counsel of Record
LIPPMAN & HART
Suite 220
1801 K. Street, N.W.
Washington, DC 20006
(202) 467-6520

PETER P. PARAVATI, P.C.
Attorneys for Petitioners
Office and P.O. Address
217 Rutger Street
Utica, NY 13501-3687
Tel. No. (315) 735-6481

Of Counsel:
PETER P. PARAVATI
CONSTANCE J. ANGELINI

Decision of the United States Court of Appeals for the Second Circuit, Dated October 6, 1982.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1068—August Term, 1981

(Argued April 28, 1982 Decided October 6, 1982)

Docket No. 81-7635

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased,

Plaintiff-Appellant,

—v.—

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU and PAUL BUSH as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Defendants-Appellees.

Before:

MANSFIELD and KEARSE, *Circuit Judges,* and CABRANES, *District Judge.**

* The Honorable José A. Cabranes, of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from a final judgment of the United States District Court for the Western District of New York, John T. Curtin, *Chief Judge*, denying plaintiff's request for a declaration of entitlement to pension fund benefits under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

Reversed and remanded.

FRANK J. DOLCE, Buffalo, New York (Collins, Collins & Di Nardo, P.C., Buffalo, New York, on the brief), *for Plaintiff-Appellant.*

PETER P. PARAVATI, Utica, New York (Peter P. Paravati, P.C., Utica, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge*:

Plaintiff Clara Duchow appeals from a final judgment of the United States District Court for the Western District of New York, John T. Curtin, *Chief Judge*, dismissing her suit against defendants New York State Teamsters Conference Pension and Retirement Fund ("the Fund") and its individual trustees seeking a declaratory judgment that she is entitled to certain benefits from a pension fund of which her late husband, Herman Duchow ("Duchow"), was a member. The district court denied plaintiff's motion for partial summary judgment and granted defendants' motion for summary judgment

on the ground that Duchow's right to pension benefits had not vested. We conclude that the Employee Retirement Income Security Act ("ERISA" or "the Act"), 29 U.S.C. §§ 1001 *et seq.* (1976), requires that pension benefits become vested upon an employee's attainment of "normal retirement age," as defined in the Act, and that Duchow's rights had vested. We therefore reverse the judgment of the district court and remand for entry of partial summary judgment in favor of plaintiff and for determination of the amount of benefits to which she is entitled.

BACKGROUND

The relevant facts are not in dispute. Duchow became an employee of Southland Frozen Foods, Inc. ("Southland"), on September 1, 1963. Subsequently, Southland entered into a collective bargaining agreement with Local Union No. 558 of the International Brotherhood of Teamsters. As a result, on February 1, 1969, Duchow became a member of the pension plan ("the Plan") established by the Fund. In February 1977, at the age of 69, Duchow applied to the Board of Trustees of the Fund for pension benefits. His application was denied. On May 31, 1977, Duchow terminated his employment with Southland. He thereafter returned to Southland and was employed there in January and February of 1979. During this period Duchow reapplied for pension benefits. This application too was denied.

In denying Duchow's applications, the Trustees took the position that Duchow had no vested pension rights because he had not fulfilled the Plan's service requirements. They relied on Plan provisions that, in order to receive pension benefits, an employee must have attained either

(a) Age 60 with 15 or more years of past and future service combined, or

(b) Age 65 with 10 or more years of future service.

"Past service" meant the period of employment prior to the date the employer became obligated to make contributions to the Plan—in Duchow's case, February 1, 1969; "future service" meant the period of employment following that date. As of February 1979, Duchow had 5.4 years of past service and 8.9 years of future service, for a total of 14.3 years. Thus, although he was over the age of 65, Duchow concededly met neither of the Plan's alternative requirements with respect to periods of service.

The present action was commenced by Duchow in 1979. Upon his death, plaintiff, as his administratrix and widow, was substituted for him. She seeks to recover for benefits to which Duchow was entitled during his lifetime, as well as survivor benefits to which she is personally entitled. Her entitlement to survivor benefits depends on the eligibility of Duchow to receive benefits. The district court granted summary judgment in favor of defendants on the ground that Duchow had not met the Plan's service requirements. Plaintiff contends that, notwithstanding the Plan's service requirements, ERISA required that Duchow's right to accrued pension benefits be recognized as vested on February 1, 1979, the tenth anniversary of his joining the Plan. For the reasons below, we agree.

DISCUSSION

ERISA, enacted in 1974, established a comprehensive federal regulatory scheme governing private retirement pension plans. The Act was passed after congressional

investigations indicated that regulation was necessary in order to curb abuses of such plans. *See* 29 U.S.C. § 1001 (1976); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 362 (1980). More specifically, Congress found, *inter alia*, "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . . ." 29 U.S.C. § 1001(a). ERISA was designed to reduce, by various means, the number of pension benefits lost.

A. *Minimum Vesting Requirements under ERISA*

As one method of accomplishing the goal of decreasing the number of lost pensions, § 203 of ERISA established certain minimum vesting requirements that all covered plans must meet. Section 203(a) provides, in pertinent part, as follows:

> Minimum vesting standards
>
> (a) Nonforfeitability requirements
>
> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table: [table omitted].

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table: [table omitted].

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this paragraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

* * *

29 U.S.C. § 1053(a)(1976). Thus, under § 203(a)(2), a plan is required to adopt one of three vesting standards linked to the employee's years of service. There is no question that the Plan at issue here meets the requirements of § 203(a)(2). It provides for "100% vesting after 10 years of future service, that is, years in which contributions are made on behalf of the employee," and thereby complies with the standard set in subparagraph (A). Defendants contend that no more is required.

Plaintiff argues, however, that the first clause of § 203(a) imposes an additional minimum vesting requirement. That clause states that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . ." 29 U.S.C. § 1053(a). "Normal retirement age" is defined in § 3(24) of the Act as

> the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24). Reading "10th anniversary" in accordance with its normal meaning, plaintiff contends that in order to comply with § 203(a) a plan not only must provide for vesting upon completion of a certain period of service, but also must provide for vesting at a certain time regardless of the employee's years of service.

We agree that § 203(a)'s provisions with regard to employer contributions are properly interpreted as imposing two distinct types of minimum vesting requirements, one of which is independent of the employee's years of service.[1] We reach this conclusion on the basis of the statutory language, legislative history, and declared purposes of ERISA.

First, the elaborately conjunctive language of § 203(a), requiring that a plan "*shall provide* . . . nonforfeitab[ility] upon the attainment of normal retirement age *and in addition shall satisfy* the requirements of paragraph[ ] . . . (2) of this subsection" (emphasis added), suggests strongly that two sets of requirements are imposed. The differing thrusts of the language of paragraph (2) and the first clause of § 203(a) provide further support for this view. Paragraph (2) provides three alternative standards, each of which deals with the plan's service requirements; none of the three makes any mention of retirement age. Accordingly, § 203(a)(2) has been described as requiring vesting of rights "prior to retirement." *See, e.g., Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 510. In complementary fashion, the first clause of § 203(a) refers only to the attainment of normal retirement age and makes no mention of periods of service. Thus both the format of § 203(a) and the disparate contents of its conjoined parts indicate that two discrete vesting requirements are imposed, the first linked to age without regard to length of service and the second depending on length of service without regard to age.

The legislative history of § 203(a) confirms the correctness of this reading of the statutory language. The first

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[1] The requirement in § 203(a)(1), that the right to the benefits accrued from an employee's own contributions be vested, is, of course, also unrelated to the period of service.

clause of § 203(a) did not appear in the original House and Senate bills that led to the enactment of ERISA. Rather, the early versions of § 203(a) were devoted to the imposition of a requirement that rights become vested prior to the employee's retirement. Committee reports stated that the goal was to introduce protection for the worker whose employment was terminated before he reached retirement age and who often thereby was denied pension benefits regardless of the number of years he had worked. *See, e.g.*, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 3, 22, 53 (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4670, 4672, 4689, 4719; Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4890, 4891, 4901, 4907, 4929. By contrast, the reports noted that "present law" already required that an employee's retirement benefit rights vest at his retirement age:

> Plans which qualify under the Internal Revenue Code are now required to provide vested (i.e., non-forfeitable) rights to participating employees when they attain the normal or stated retirement age. . . .
>
> However, qualified corporate plans are generally not required to provide vested rights to participating employees before normal retirement age. . . .

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 53 (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4670, 4719; *accord* Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4890, 4929. Thus, the original bills were plainly concerned with creating vesting rights in addition to the already existing "retirement age" vesting requirement.

The compromise bill that became ERISA made it clear that Congress wished to preserve the already existing

vesting requirements as well. The first clause of § 203(a), expressly requiring the vesting of an employee's rights upon his attainment of normal retirement age, was inserted by the House and Senate Conference Committee, which proposed its own version of the minimum vesting provision. After discussing the conference modifications of the proposed vesting standards relating to service, the Joint Explanatory Statement in the Conference Committee Report stated as follows:

> In addition, all plans would have to meet the requirement of present law that an employee must be 100 percent vested in his accrued benefit when he attains the normal or stated retirement age (or actually retires).

H.R. Rep. No. 93-1280, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 5038, 5050.

Finally, the interpretation of § 203(a) as imposing two independent vesting requirements is consistent with and furthers the congressional purpose. As discussed above, ERISA is a remedial statute, enacted to protect the beneficiaries of retirement plans by reducing the risk of loss of pension benefits. Interpreting the first clause of § 203(a) to set forth an additional vesting requirement furthers this goal. Certainly we have found no support for the proposition that Congress intended to eliminate what it perceived as a benefit already enjoyed by employees, and thereby to increase employees' losses of retirement plan benefits.

We do not believe that a contrary interpretation is required by statements in the original committee reports to the effect that vesting requirements should be "age neutral" so as not to discourage employers from hiring

older employees. *See, e.g.*, Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4890, 4905. First, we note that in order that other provisions of the Act not have the effect of encouraging age discrimination, § 202(a)(2)(B) of ERISA provides that a worker hired within five years of his attainment of normal retirment age need not be allowed to participate in the pension plan. 29 U.S.C. § 1052(a)(2)(B). Second, the effect of the interpretation we adopt is not, as defendants would have it, " 'to grant older people vested rights to their accrued pension benefits more quickly than younger people.' " (Defendants' brief on appeal at 5 (quoting Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4890, 4905).) Under the statutory definition of "normal retirement age," vesting cannot occur earlier than the tenth anniversary of the employee's joining the plan, unless the plan itself provides for an earlier date.[2]

In sum, we conclude that the language, history and purposes of ERISA point forcefully to the conclusion

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2 Nor do we find merit in defendants' hypothesis that, rather than imposing an additional vesting requirement, the first clause of § 203(a) was intended merely to govern the time of payment of benefits. Section 203(a) makes no mention whatever of payment. Rather, it is entitled "Minimum vesting standards," and it specifies the conditions under which an employee's "right" to a pension benefit must become "nonforfeitable." Throughout the legislative history the term "nonforfeitable" was used interchangeably with the term "vested." *See, e.g.*, H.R. Rep. No. 93-533, 93 Cong., 2d Sess. 5, 20, 23 (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4639, 4643, 4658, 4661; H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 18 (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4670, 4685; Sen. Rep. No. 93-127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4838, 4844; Sen. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 *U.S. Code Cong. & Ad. News* 4890, 4929; *see also Nachman Corp. v. Pension Benefit Guaranty Corp., supra*, 446 U.S. at 376-78.

that the first clause of § 203(a) imposes a vesting requirement that is independent of the service-period vesting standards imposed in § 203(a)(2).[3] All that remains is the question of the proper interpretation of "10th anniversary" in the definition of "normal retirement age."

B. *The Meaning of "Anniversary"*

Defendants contend that even if on its face the first clause of § 203(a) seems unrelated to any service requirement, a service requirement is incorporated by the portion of the definition of "normal retirement age" that refers to the plan participant's "10th anniversary," *i.e.*,

> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24)(B). They argue that "10th anniversary" means tenth year of service, a "year of service" being defined in § 203(b)(2)(A) of the Act, 29 U.S.C.

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[3] The Tax Court has reached the same conclusion in interpreting a substantially identical counterpart provision in the Internal Revenue Code, 26 U.S.C. § 411(a)(1976). *See Trustees of the Taxicab Industry Pension Fund v. Commissioner,* (1981) T.C.M. (CCH) ¶ 651; *Board of Trustees of New York Hotel Trades Council & Hotel Association of New York City, Inc. Pension Fund v. Commissioner,* (1981) T.C.M. (CCH) ¶ 597; *Caterpillar Tractor Co. v. Commissioner,* 72 T.C. 1088 (1979).

We note that in *Haeberle v. Board of Trustees of Buffalo Carpenters,* 624 F.2d 1132, 1137 n.8 (2d Cir. 1980), our Court touched briefly on the question of retirement-age vesting under § 203(a), in a manner suggesting that it might reject our present interpretation of that section if it were required to reach the question. The *Haeberle* panel did not analyze that question, however, since § 203(a) was clearly unavailable to Haeberle, who (a) had reached age 65 and his tenth anniversary prior to the enactment of ERISA, and (b) had forfeited his pension credits prior to the date on which § 203(a) became applicable to the plan in which he had participated.

§ 1053(b)(2)(A), as 1000 hours of service. We believe that "anniversary" was intended to have its ordinary meaning rather than the strained construction defendants would give it.

The normal dictionary meaning of the word "anniversary" is "the annual return of the day of a past event." *Webster's Second International Dictionary* 108 (2d ed. 1957). The word plainly denotes a date rather than the years between the date and the past event. ERISA itself does not contain a definition of "anniversary." This omission, in a complex statute replete with defined terms, suggests that the ordinary meaning of the word was intended. We note also that § 206(a) of the Act, which is entitled "Commencement date for payment of benefits," refers to the 60th day after "the close of the plan year in which . . . occurs the 10th anniversary of the year in which the participant commenced participation in the plan." 29 U.S.C. § 1056(a)(2). Thus, "anniversary" is used in § 206(a)(2) for its normal denotation of a date rather than a period of time. There is no reason to believe Congress intended a different denotation in the definition of normal retirement age. Further, to construe the use of the word "anniversary" as imposing a service requirement would be inconsistent with the Act's leglislative history and purposes discussed above. And had Congress intended "normal retirement age" to be dependent on ten years of service, it would hardly have selected such convoluted and imprecise (for defendant's purposes) language as "the 10th anniversary of the time a plan participant commenced participation in the plan" instead of a clear and direct phrase such as "the participant's completion of ten years of service."

In short, we are persuaded that Congress intended that an employee's pension rights would vest, irrespective of

the length of his service, either on his 65th birthday or on the tenth anniversary of his joining the plan, whichever occurred later, unless the plan itself allowed earlier vesting.

C. *Duchow's Accrued Benefits*

This conclusion does not mean, however, that every employee will be entitled to a pension calculated on the basis of a minimum of ten years of service. Although the *time* of vesting under the first clause of § 203(a) does not depend on the length of an employee's service, the *amount* of pension benefits that become vested, or nonforfeitable (*see* note 2 *supra*), does depend on the length of service. Thus, § 3(19) of ERISA defines "nonforfeitable" by referring to "that part of an immediate or deferred benefit under a pension plan which arises from the participant's service." 29 U.S.C. § 1002(19).[4] Further, § 204 of the Act, 29 U.S.C. § 1054, sets out the requirements that a plan must meet for the accrual of the benefits to which each participant is entitled, and many of its subparts are linked to the plan participant's years of participation. *See Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 512 n.9. Under § 204(b)(1)(A)(ii), for example, the amount of benefits to be accrued depends on "the number of years . . . of [the participant's] participation in the plan." 29 U.S.C. § 1054(b)(1)(A)(ii). *See also* §§ 204(b)(1)(C), (D) and (E) of the Act, 29 U.S.C. § 1054(b)(1)(C), (D), and (E). Accordingly, we

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[4] Section 3(19) provides, in pertinent part, as follows:

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

conclude that Duchow became entitled on the tenth anniversary of the commencement of his participation in the Plan, *i.e.*, February 1, 1979, to receive whatever pension benefits he had accrued by virtue of his years of participation in the Plan.[5]

Finally, we note defendants' contention that they have no obligation under ERISA to take into account Duchow's participation in the Plan prior to 1979 in calculating his accrued pension benefits because those early years of service were followed by a break of approximately one year and seven months when Duchow was unemployed, and because after he returned to Southland he did not complete a year of service. Section 203(b) of ERISA, 29 U.S.C. § 1053(b), sets forth various rules governing the computation of periods of service, and § 203(b)(3)(B) provides as follows:

> (B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

29 U.S.C. § 1053(b)(3)(B). This provision, however, merely sets out the minimum standards a plan must meet. The Plan here has more lenient break-in-service rules, defining a break in service as "[l]ess than 501 hours in each of three successive plan years." Under the Plan's definition, Duchow's absence from Southland did not

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5 It appears that defendants' opposition to plaintiff's demand for survivor benefits was based solely on its contention that Duchow himself had no entitlement to benefits. If this be so, our determination that Duchow was eligible removes any barrier to the recognition of plaintiff's claim for survivor benefits.

constitute a break in service, and hence all of his years of participation in the Plan should be taken into account.

CONCLUSION

The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

700—10-13-82 • USCA—30208

A-17

Decision and Order of Chief U. S. District Judge John T. Curtin.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

Plaintiff,

vs.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Defendants.

CIV-79-696C

Plaintiff Clara Duchow brings this action against the New York State Teamsters Conference Pension and Retirement Fund [the Fund] and the individual Trustees of the Fund, challenging the denial of pension benefits on behalf of her late husband and the denial of survivor's benefits to herself

as his widow. Plaintiff has now moved for partial summary judgment. Defendants have filed a cross motion for summary judgment. As the essential facts are not in dispute, I will set them out briefly.

Plaintiff's decedent, Herman Duchow, commenced his employment with Southland Frozen Foods, Inc., in 1963. Southland entered into a collective bargaining agreement with Local Union #558 of the International Brotherhood of Teamsters, and decedent became a member of the Fund on February 1, 1969. In February of 1977 Mr. Duchow submitted his first application for pension benefits to the Board of Trustees of the Fund. This application was denied, but Mr. Duchow nevertheless left his job on May 31, 1977, when he was 70 years of age. The decedent returned to Southland and worked during January and February of 1979. He submitted a second application for pension benefits in January of 1979, which application was also denied. This action was originally commenced by Mr. Duchow in 1979. Upon his death in February of 1980, his widow was substituted as plaintiff. Plaintiff was married to decedent during January and February of 1979 and at all times thereafter until his death. Plaintiff's claim for survivor's annuity benefits is entirely dependent upon the decedent's entitlement to pension benefits.

In denying Mr. Duchow's application for pension benefits, the defendants relied upon a 1976 amendment to the Fund. Under this amendment, an employee may be denied pension benefits unless he or she satisfies either or both of the following requirements:

1. Age 60 with 15 or more years of past and future service combined.

2. Age 65 with 10 or more years of future service.

For purposes of the Retirement Fund Pension Plan [the Plan], "future service" means years the employee has worked as a member of the Plan—years during which contributions to the Fund were required to be made for the employee by the employer. At the end of his employment in 1979, Mr. Duchow was credited with 14.3 years of total service. Because Southland did not enter into the collective bargaining agreement with defendant until 1969, only 8.9 of these years were considered future service years. The remaining 5.4 years were of past service. Thus, while Mr. Duchow met the age requirement for each of these formulas, he was unable to satisfy either of the service requirements.

The defendants contend that the 1976 Amendment to the Plan, including the service requirements, was adopted in order to qualify the Plan as a valid retirement trust within the meaning of the Employee Retirement Income Security Act [ERISA], 29 U.S.C. §§1001 *et seq.*, and the corresponding provisions of the Internal Revenue Code, 26 U.S.C. §§411 *et seq.*

The minimum vesting standards of ERISA allow an employer or union to choose one of three vesting standards. The parties agree that the Trustees have chosen the simplest of the three vesting standards, 29 U.S.C. §1053(a)(2)(A); 26 U.S.C. §411(a)(2)(A). That section provides:

> A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

In computing an employee's years of service for purposes of the 10-year vesting standard, the general rule is that all of the employee's years with the employer, even those prior to the enactment of ERISA, are to be included. 29 U.S.C.

§1053(b)(1); 26 U.S.C. §411(b)(1). There are, however, several exceptions to this rule, including §1053(b)(1)(C), which allows exclusion of:

> years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury.

Since Southland Frozen Foods did not have a plan prior to February 1, 1969, Mr. Duchow's 5.4 years of past service were properly excludable. Accordingly, the court finds that the Plan comports with the provisions of ERISA and that decedent was not entitled to pension benefits under these provisons of the Act.

Plaintiff argues next that these provisions, the 10%-100% vesting standard, apply only to pre-retirement vesting of benefits. Plaintiff's contention is that there are two separate vesting requirements to be found in 29 U.S.C. §1053; 26 U.S.C. §411. The first is the pre-retirement standards, and the second is found in the first sentence of §1053 which states:

> an employee's right to his normal retirement benefit is nonforfeitable *upon* the *attainment of normal retirement age.*

(Emphasis supplied.) Plaintiff's argument, basically, is that Mr. Duchow attained his normal retirement age in 1979 and was thus entitled to benefits without regard to §1053(a)(2) or to the requirements of the Plan.

> "Normal retirement age" is defined as the earlier of:
>
> > (A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. §1002(24); 26 CFR §1.411(a)-7(b). Under this definition, decedent must have been qualified, if at all, under the 10th anniversary provision.

Plaintiff claims that, since her husband was employed in February of 1979, the 10th anniversary of his commencement in the Plan, he attained normal retirement age within the meaning of the statute. She contends that the 1½ year period from May of 1977 to January of 1979 during which Mr. Duchow was unemployed should not be counted against him because of the break-in-service provisions of the Plan whereby service prior to any period of unemployment may not be disregarded unless a member has worked "less than 501 hours in each of three successive years." Since Mr. Duchow's break was for only one year, plaintiff argues that his prior service should be counted towards determining his 10th anniversary.

Plaintiff argues that since "anniversary" is nowhere defined in the statute, it should be given its usual meaning. Defendant contends that the word "anniversary" in §1002(24) has the same meaning as does "10th year of service." A year of service is defined as 1,000 hours of service. 29 U.S.C. §1052(b)(2)(A). Under defendants' definition, therefore, Mr. Duchow could attain normal retire ment age only by completing 10,000 hours of service.

The court rejects plaintiff's proposed definition of decedent's normal retirement age. In claiming that Mr. Duchow had attained his 10th anniversary, plaintiff is suggesting that Mr. Duchow receive credit not only for the time prior to the 1½ year break but that he also receive service credit for the time he was not employed. Plaintiff is suggesting that the court imply that Mr. Duchow's 9th anniversary of service occurred in February of 1978—while he was not an employee. There is no support for this contention within the statute itself. Nothing in ERISA or in the Plan requires an employer or union to credit an employee for services which he or she did not render.

Plaintiff relies upon the case of *Caterpillar Tractor v. CIR*, ¶72.89 P-H-TC (1979) to support her contentions. In *Caterpillar Tractor,* the tax court held that a proposed retirement plan was not qualified for the tax preference treatment of 26 U.S.C. §§411 *et seq.* The *Caterpillar* plan adopted also the 10 years—100% vesting provisions of §1053(a)(2)(A). The plan also provided a normal retirement age of 65 years and a mandatory retirement of 66 years. It did not provide, however, for a maximum hiring age. Enforcement of the mandatory retirement clause, therefore, would prohibit employees who were hired at age 57 or older from working 10 full years, and their pension rights never could vest. The tax court held that these provisions violated that part of §1053(a) upon which plaintiff relies; namely, the provision that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age."

This case is clearly distinguishable from *Caterpillar Tractor.* The plan under consideration here does not contain any mandatory retirement age, as evidenced by the fact that Mr. Duchow did not retire until after age 70. There is nothing to

indicate that Mr. Duchow was prohibited by any of the provisions of the Plan from continuing to work until he had attained sufficient service credit.

Therefore, because plaintiff's decedent did not fulfill the service requirements under the Plan, he was not entitled to receive pension benefits from the Fund. His widow is thus not eligible to receive survivor's benefits. The motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: August 13, 1981

Judgment of United States District Court for the Western District of New York, Filed August 17, 1981.

UNITED STATES DISTRICT COURT,

FOR THE WESTERN DISTRICT OF NEW YORK.

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

vs.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU and PAUL BUSH, as Trustees of the N. Y. State Teamsters Conference Pension & Retirement Fund.

Civil Action File No. 79-696C

This action came on for hearing before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged That pursuant to Decision and Order Signed and Filed August 13, 1981, because plaintiff's decedent did not fulfill the service requirements under the Plan, he was not entitled to receive pension benefits from the Fund. His widow is thus not eligible to

receive survivor's benefits. The motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted.

Dated at Buffalo, New York, this 17th day of August, 1981.

JOHN T. CURTIN
U. S. District Judge

Order of U. S. District Judge John T. Curtin, Dated June 2, 1980.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

HERMAN DUCHOW,

Plaintiff,

vs.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Defendants.

Civil Action No. 79-696

On stipulation of the parties for substitution of Clara Duchow as plaintiff in place of Herman Duchow, deceased, it appearing to the Court that the said Herman Duchow died intestate on the 20th day of February, 1980; that the claim asserted by him in this action was not thereby extinguished; that Clara Duchow has been duly appointed administratrix of the estate of said Herman

Duchow, and has qualified and is acting as such; and that as the surviving spouse of Herman Duchow she may have an individual claim to survivor's benefits;

IT IS ORDERED, that Clara Duchow, both individually and as administratrix of the estate of Herman Duchow, be substituted as plaintiff herein in place of Herman Duchow, deceased, without prejudice to any proceedings heretofore had in this action, and that the title of the action be amended accordingly.

Dated: June 2, 1980

JOHN T. CURTIN
United States District Judge

Mandate of the U. S. Court of Appeals for the Second Circuit, Dated October 6, 1982.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October one thousand nine hundred and eighty-two

Present:

Hon. Walter R. Mansfield,
Hon. Amalya L. Kearse,
Circuit Judges
Hon. Jose A. Cabranes,
District Judge

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

Plaintiff-Appellant,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., *et al.*,

Defendants-Appellees.

#81-7635

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

by ARTHUR HELLER,
Deputy Clerk

A True Copy

A. DANIEL FUSARO,
Clerk
By Francis X. Gindhart
Chief Deputy Clerk

Judgment of the U. S. District Court for the Western District of New York, Dated December 17, 1982.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CLARA DUCHOW, etc.,

Plaintiff,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *et al.*,

Defendants.

Civ-79-696C

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated October 6, 1982, having been filed in the office of the Clerk of this court on December 14, 1982, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

JOHN T. CURTIN
Chief United States District Judge

Dated: December 17, 1982

Complaint.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

HERMAN DUCHOW,

Plaintiff,

vs.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, Sr., KEPLER VINCENT, ROCCO F. DEPERNO, JACK CANZONERI, VICTOR MOUSSEAU and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Defendants.

Civil Action No. 79-696

1. This action is one for a declaratory judgment pursuant to Rule 57, Federal Rules of Civil Procedure, and Title 28 U.S.C. Section 2201, to clarify rights to and recover pension benefits; to enforce provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 *et seq.* (hereinafter "ERISA"); to restrain a violation of Section 302 of the Labor-Management Relations Act, 29 U.S.C. Section 186 (hereinafter

"L.M.R.A."); and to obtain other appropriate equitable relief. Jurisdiction of this action is conferred upon the Court by Section 502 (e) (1) of ERISA (29 U.S.C. §1132[e][1]), and by Section 302 (e) of the L.M.R.A. (29 U.S.C. §186[2]).

2. Plaintiff is a resident of the Town of Gasport, New York, which is in the jurisdiction of the United States District Court for the Western District of New York.

3. Defendant New York State Teamsters Conference Pension and Retirement Fund (hereinafter referred to as the "Fund") is, in conjunction with its associated plan (hereinafter referred to as the "Plan"), an employee pension benefit plan within the meaning of ERISA Section 3 (2) (29 U.S.C. §1002[2]).

4. Defendant Fund was established effective January 1, 1954 pursuant to the provisions of collective bargaining agreements between various locals of the International Brotherhood of Teamsters and certain employers in the trucking and allied industries. Such locals and such employers are, respectively, employee organizations representing employees in an industry affecting commerce and employers engaged in an industry affecting commerce within the meaning of ERISA and the L.M.R.A.

5. Upon information and belief, the individual defendants, with the exception of defendants T. E. Nolan and Jack Canzoneri, were at the time of plaintiff's initial application for pension benefits, as hereinafter stated, members of the Board of Trustees of defendant Fund.

6. Upon information and belief, all such individual defendants were at the time of plaintiff's second application for pension benefits, as hereinafter stated, and still

are, the duly constituted Board of Trustees of defendant Fund, with their main office for business located at Utica, New York. Such individual defendants are fiduciaries within the meaning of ERISA Section 3(21) (A) (29 U.S.C. §1002 [21][A]).

7. Pursuant to ERISA Section 404(a) (1) (29 U.S.C. §1104[a][1]), L.M.R.A. Section 302(c)(5) (29 U.S.C. §186 [c][']), and the terms of the Plan, the individual defendants are required to hold and administer the assets of the defendant Fund for the sole and exclusive benefit of participating and retired members and their beneficiaries, and to discharge their duties in a manner which is consistent with the provisions of Title I of ERISA (29 U.S.C. §1001, *et seq.*).

8. Plaintiff was continuously employed in the trucking and allied industries by participating employers under the plan from September 1, 1963 through May 31, 1977, and was also so employed during the months of January and February, 1979.

9. Plaintiff became a member of the Plan on February 1, 1969, the first day for which contributions were made to defendant Fund on his behalf, and was then credited by the Fund with a total of 5 and 4 tenths (5.4) years of past service under the Plan.

10. Upon information and belief, substantial contributions have since been made by participating employers to defendant Fund on plaintiff's behalf, which such contributions have resulted in plaintiff being credited with 9 and 0 tenths (9.0) years of future service, for a total credit under the plan of 14 and 4 tenths (14.4) years of past and future service combined.

11. Plaintiff filed his first application for pension benefits, a copy of which is annexed hereto as Exhibit A, on or about February 22, 1977. On that date plaintiff had attained the age of 69 years, and had completed 13 and 7 tenths (13.7) years of service.

12. Said service was in excess of the ten years of service necessary for plaintiff to obtain a nonforfeitable right to his pension benefits pursuant to ERISA Section 203 (a)(2)(A) (29 U.S.C. §1053[a][2][A]). It was also in excess of the 12 and 7 tenths (12.7) years of service completed by one Howard Grosskopf, with respect to whom individual defendants had previously authorized payment of pension benefits, as evidenced by letter of Defendant William H. Mosley, Sr., a copy of which is annexed hereto as Exhibit B.

13. Plaintiff's first application for pension benefits was denied by letter of Defendant William H. Mosley, Sr., a copy of which is annexed hereto as Exhibit C, for the stated reason that plaintiff did not have "15 years of credited service as required by the Pension Plan."

14. Plaintiff returned to covered employment and was a member of the plan on whose behalf contributions were made by participating employers to defendant Fund for the months of January and February, 1979.

15. Some time prior to January 1979, the individual defendants had provided plaintiff with a one page summary of certain provisions of the plan. This summary, a copy of which is annexed hereto as Exhibit D, states that normal retirement age is attained under the plan at age 65 "with 10-14 years of service."

16. Plaintiff in reliance on such summary submitted his second application for pension benefits, a copy of which is annexed hereto as Exhibit E, on or about January 15, 1979.

17. Plaintiff had completed 14 and 2 tenths (14.2) years of service as of January 15, 1979. On that date he was also an employee and a member of the Plan; was more than 65 years of age; and had reached the tenth anniversary of the date he commended participation in the Plan as defined by Treasury Regulation Section 1.411(a)-7(b)(1).

18. Treasury Regulation Section 1.411(a)-7(b)(1) provides that participation commences of the first day on the first year in which the participant commenced his participation under the Plan.

19. Plaintiff had thus attained normal retirement age as defined in ERISA Section 3(24) (29 U.S.C. §1002[24]), and had consequently earned a nonforfeitable right to his pension benefits pursuant to ERISA Section 203(a) (29 U.S.C. §1053[a]).

20. Plaintiff's second application was also denied by letter of Defendant William H. Mosley, Sr., a copy of which is annexed hereto as Exhibit F, and defendants have thereafter consistently refused to either pay or acknowledge plaintiff's right to his pension benefits.

21. Section 4A(4) and 5(2) of the Plan provide that pension benefit payments shall commence on the first day of the calendar month next following receipt by the Board of Trustees of written application therefor.

22. Pursuant to these Plan provisions and the facts stated in paragraphs (11) and (12) above, plaintiff is entitled to pension benefits based on his credited service under the Plan, payment of which should run from March 1, 1977.

23. Alternatively, pursuant to said Plan provision and the facts stated in paragraphs (8) through (10), and (14) through (19) above, plaintiff is entitled to pension benefits based on his credited service under the Plan, payment of which should run from February 1, 1979.

24. In denying plaintiff his pension benefits, the individual defendants have acted arbitrarily and capriciously, have failed to discharge their duties in a manner which is consistent with Title I of ERISA, and have thus violated L.M.R.A. Section 302(c)(5) (29 U.S.C. §186[c][5]) and ERISA Section 404 (a)(1)(D) (29 U.S.C. §1104[a][1][D]). Therefore, any provision of the plan which would deny plaintiff his pension benefits should be declared without force or effect as to plaintiff.

25. Plaintiff has been subject to extreme anxiety, worry and apprehension as a result of defendants' refusal to pay his pension benefits.

WHEREFORE, plaintiff asks judgment:

1. Declaring that the defendant Fund is liable to plaintiff for past and future pension benefits;

2. Directing the defendant Fund to fully account to plaintiff for all such pension benefits found by the Court to be due and owing to plaintiff;

3. Declaring that defendant Fund is liable for, and directing it to pay damages in the amount of $50,000 as recompense for plaintiff's mental anguish;

4. Declaring that defendant Fund is liable for and directing it to pay plaintiff's costs and reasonable attorney's fees and expenses incurred in maintaining this action;

Together with such other and further relief as to the Court seems just and proper.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
By: (s) David B. Herrmann
Attorneys for Plaintiff
Office and P. O. Address
One Niagara Square
Buffalo, NY 14202

Dated: September 13, 1979
Buffalo, New York

Statutory Provisions Involved.

1. Section 2 of the Employee Retirement Income Security Act, 29 U.S.C. 1001, provides:

§ 1001. Findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting

provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

2. Sections 3(22), (23) and (24) of the Employee Retirement Income Security Act, 29 U.S.C. §§1002 (22), (23) and (24) provide:

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 204(b)(1)(G) [29 USCS § 1054(b)(1)(G)].

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 USCS § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) The later of—

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

3. Sections 202(a) (1) and (2) of the Employee Retirement Income Security Act, 29 U.S.C. §§1052(a)(1) and (2) provide:

§ 1052. Minimum participation standards

(a)(1)(A) No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—

(i) the date on which the employee attains the age of 25; or

(ii) the date on which he completes 1 year of service.

(B)(i) In the case of any plan which provides that after not more than 3 years of service each participant has a

right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting "3 years of service" for "1 year of service". (ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) of the Internal Revenue Code of 1954 [26 USCS § 170(b)(1)(A)(ii)]) by an employer which is exempt from tax under section 501(a) of such Code [26 USCS § 501(a)], which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting "30" for "25". This clause shall not apply to any plan to which clause (i) applies.

(2) No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless—

(A) the plan is a—

(i) defined benefit plan, or

(ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury), and

(B) such employees begin employment with the employer after they have attained a specified age which is not more than 5 years before the normal retirement age under the plan.

4. Section 203(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1053(a) provides:

§ 1053. Minimum vesting standards.

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table: (table omitted)

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom

the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table: (table omitted)

(ii) Notwithstanding clause (i), a plan shall not be treated as satsifying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

5. Section 203(b)(2)(A) of the Employee Retirement Income Security Act, 29 U.S.C. §1053(b)(2)(A) provides:

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 22, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2), the plan may not disregard any such year of service during which the employee was a participant;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970; and

(F) years of service before this part [29 USCS §§1051-1061] first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.

(2) (A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 202(a)(3)(C) [29 USCS §1052(a)(3)(C)].

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

6. Section 204(b)(3)(A) of the Employee Retirement Income Security Act, 29 U.S.C. §1054(b)(3)(A) provides:

(3) (A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 202(b) [29 USCS §1052(b)]) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

7. Section 206(a) of the Employee Retirement Income Security Act, 29 U.S.C. §1056(a) provides:

§1056. Other provisions relating to form and payment of benefits

(a) Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

8. Section 411(a)(8) of the Internal Revenue Code, 26 U.S.C. §411(a)(8) provides:

(8) Normal retirement age—For purposes of this section, the term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

82-1118

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK J. DOLCE
Counsel of Record COLLINS, COLLINS & DI NARDO,P.C.
415 Franklin Street
Buffalo, New York 14202
(716) 854-8195

The employee attained normal retirement age upon the 10th anniversary of his participation in the pension plan, but did not have 10 years of service under the plan. The plan denied the employee any benefits because the employee did not meet the plan's vesting requirement of 10 years of service. The Court of Appeals for the Second Circuit held that Section 203(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C., Section 1053(a) requires the plan to vest the employee in his accrued benefits solely upon the attainment of normal retirement age.

QUESTIONS PRESENTED.

1. Whether the first clause of ERISA's minimum vesting provision (Section 203(a)), which incorporates the requirement that normal retirement age occurs upon an employee's 10th anniversary of participation, should be read (a) as an independent ground for vesting, or (b) as part of the ERISA provision (Section 203(a)(2))requiring vesting upon the completion of 10 years of service?

2. Does the term "10th anniversary" incorporated in the minimum vesting provision refer to (a) 10 years of service for which contributions have been made on behalf of the employee, or (b) 10 years of time following the employee's entry into the plan regardless of service or contributions?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982.

No. 82-

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T.E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The New York State Teamsters Conference Pension and Retirement Fund, T. E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on October 6, 1982. Respondent, Clara Duchow, opposes the Petition for a Writ of Certiorari.

Collins, Collins and DiNardo, P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

OPINIONS BELOW.

District Court.

A Decision and Order was issued by the district court, Chief Judge John T. Curtin, which denied plaintiff's motion for partial summary judgment and granted defendants' motion for summary judgment. Judge Curtin dismissed plaintiff's cause of action which alleged that the defendants violated the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1001 et seq. (ERISA). The Decision and Order is not officially reported. Pursuant to the Decision and Order, judgment was entered on August 17, 1981.

Court of Appeals.

On October 6, 1982, the Court of Appeals for the Second Circuit reversed the judgment of the District Court. The opinion of the Court of Appeals is reported at 691 F. 2d 74 (2nd Cir. 1982).

Jurisdiction.

The decision of the Court of Appeals was entered October 6, 1982. The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254(1).

Statutory Provisions Involved.

1. Sections 2, 3(22), 3(23), 3(24), 202(a)(1), 202(a)(2), 203(a), 203(b)(2)(A), 204(b)(3)(A), and 206(a) of the Employee Retirement Income Security Act, 29 U.S.C., Sections 1001, 1002(22), 1002(23), 1002(24), 1052(a)(1), 1052(a)(2), 1053(a), 1053(b)(2)(A), 1054(b), 3(A), and 1056(a).

2. Section 411(a)(8) of the Internal Revenue Code, 26 U.S.C., Section 411(a)(8).

STATEMENT OF THE CASE.

On October 6, 1982, a three-judge panel[1] of the United States Court of Appeals for the Second Circuit reversed a district court judgment which had denied Clara Duchow's request for a declaration of entitlement to pension fund benefits under the Employee Retirement Income Security Act, 29 U.S.C., Section 1001 et seq. (ERISA). The court of appeals, in reversing, held that ERISA requires that pension benefits become vested upon an employee's attainment of "normal retirement age," as defined in the Act, and that Clara Duchow was entitled to pension benefits, both as an individual and as Administratrix of the estate of Herman Duchow. The court remanded for entry of partial summary judgment in favor of plaintiff and for a determination of the amount of benefits. The New York State Teamsters Conference Pension and Retirement Fund, T. E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund ("the Fund"), petitioners, seek review of the court decision.

General Background.

Herman Duchow became an employee of Southland Frozen Food, Inc. ("Southland"), on September 1, 1963. Subsequently, Southland entered into a collective bargaining agreement with Local No. 558 of the International Brotherhood of Teamsters. On February 1, 1969, Duchow became a member of the pension plan ("the Teamsters Plan")established by the Fund. In February of 1977, at the age of 69, Duchow applied to the Board of Trustees of the Fund for pension benefits. His application

1. Circuit Judges Mansfield and Kearse; District Judge Cabranes, United States District Court for the District of Connecticut, sitting by designation.

was denied. On May 31, 1977, Duchow terminated his employment with Southland. He thereafter returned to Southland and was employed there in January and February 1979. During this period, Duchow reapplied for pension benefits. This application, too, was denied.

In denying Duchow's applications, the Trustees took the position that Duchow had no vested pension rights because he had not fulfilled the Teamsters Plan's service requirements. They relied on Teamsters Plan provisions that, in order to receive pension benefits, an employee must have attained either

(a) Age 60 with 15 or more years of past and future service combined, or

(b) Age 65 with 10 or more years of future service.

Although Duchow was over the age of 65, he concededly met neither of the Teamsters Plan's alternative requirements with respect to periods of service, in that he had acquired 5.4 years of past service and 8.9 years of future service.

An action was commenced by Herman Duchow in 1979. The district court's jurisdiction was predicated on Section 502 of ERISA (29 U.S.C., Section 1132). Upon his death, plaintiff, Clara Duchow, as his Administratrix and widow, was substituted for him. She sought to recover for benefits to which Duchow was entitled during his lifetime, as well as benefits to which she was personally entitled. Her entitlement to survivor benefits depended on the eligibility of Herman Duchow to receive benefits. The district court granted summmary judgment in favor of the defendants, petitioners herein, on the ground that Duchow had not met the Teamsters Plan's service requirements. The plaintiff appealed the district court's decision to the United States Court of Appeals for the

Second Curcuit. The Second Circuit reversed the district court in a decision by Judge Amalya Kearse.

The Decision of the District Court.

The district court determined that since Herman Duchow failed to satisfy the 10 year service requirement under the Teamsters Plan, he was not entitled to receive pension benefits from the Fund. Therefore, the court held Duchow's widow was not entitled to survivor benefits. In reaching this conclusion, the court rejected plaintiff's argument that Section 203 of ERISA, 29 U.S.C., Section 1053, contains two separate vesting requirements, the first (Section 203(a)) requiring the nonforfeitability of benefits upon normal retirement age regardless of the plan's service requirements, and the second (Section 203(a)(2)) providing for preretirement vesting according to schedules set out in the statute. The court found that the case of Caterpillar Tractor v. Commissioner, 72 T.C. 1088 (1979), upon which plaintiff had relied, was distinguishable in that it concerned a plan which provided for a mandatory retirement age, thereby effectively preventing the vesting of rights in employees hired at age 57 or older. In Caterpillar, the tax court held that the mandatory retirement provisions of the plan under review violated that part of Section 203(a), providing that,

> ...an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age...

The district court concluded that since the Teamsters Plan did not prohibit Mr. Duchow from continuing to work until he has attained sufficient service credit for vesting, the Teamsters Plan was not

violative of Section 203(a).

The Decision of the Court of Appeals.

The court of appeals reversed the judgment of the district court. The court's decision was based on its interpretations of statutory language, legislative history, and the declared purposes of ERISA. The court of appeals determined that both the format of Section 203(a) and the disparate contents of its conjoined parts indicate that two distinct vesting requirements are imposed. The court also determined that the legislative history indicated a Congressional intent to preserve already existing vesting rights, and that Congress believed that vesting of accrued benefits on retirement age regardless of length of service was a benefit already enjoyed by employees. Finally, the court found that the imposition of two distinct vesting requirements is consistent with the purpose of ERISA, i.e., to protect beneficiaries by reducing the risk of loss of pension benefits. In construing that part of the definition of "normal retirement age," referring to a participant's "10th anniversary...in the plan" the court found that no service requirement was intended to be imposed. The court concluded that Duchow became entitled on the tenth anniversary of the commencement of his participation in the Teamsters Plan to receive whatever pension benefits he had accrued by virtue of his years of participation in the Teamsters Plan. The court cited in footnote 3 three tax court decisions which reached the same conclusion in interpreting a substantially identical conterpart provision in the Internal Revenue Code, 26 U.S.C., Section 411(a) (1976); Trustees of the Taxicab Industry Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 651; Board of Trustees of New

York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 597; Caterpillar Tractor Co. v. Commissioner, 72 T.C. 1088 (1979).

REASONS FOR DENYING THE WRIT.

Petitioners contend that the Second Circuit Court of Appeals decision, in interpreting the uniqueness and distinction between normal retirement age vesting and preretirement vesting, has deprived an essential part of the vesting standards of the Employee Retirement Income Security Act (ERISA).

Petitioners are mistaken. The Second Circuit Court of Appeals decision, in logically analyzing and highlighting the well recognized principles of normal retirement age vesting and preretirement vesting, has brought clarity and meaning to the vesting standards of ERISA.

Petitioners are in error in stating that the Second Circuit Court of Appeals has created two vesting standards. Rather, Congress, in enacting Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), has chosen to establish the various minimum vesting requirements; including, normal retirement age vesting without regard to service, immediate 100% vesting of employee contributions, and preretirement vesting depending on periods of covered service.

This sophisticated vesting framework established by Congress does not discriminate in favor of older employees and against younger employees as petitioners contend. Employees, no matter what age, are afforded the same opportunities to satisfy the age-neutral, but service

dependant, preretirement vesting schedules adopted by their particular pension plans and authorized by Section 203(a)(2) of ERISA. Congress established preretirement vesting in an attempt to stem the tide of lost pension benefits by pension plan participants who decide to terminate employment with their contributing employer prior to attaining normal retirement age. Furthermore, in recognizing normal retirement age vesting, Congress has afforded vested rights to employees that are fortunate enough to attain "normal retirement age" during their employment.

Far from promoting age discrimination, the sophisticated vesting framework of Section 203(a) of ERISA, as highlighted by the Second Circuit Court of Appeals decision, manages to afford vested rights to an increasing number of mobile employees who have more than one employer over the course of their work life, while retaining vested rights for those who attain retirement age while still employed by their contributing employer.

Petitioners also erroneously contend that the Second Circuit Court of Appeals decision will have a deleterious effect on the acturial soundness of the Fund, thereby defeating the purpose of federal pension legislation.

Petitioners' dire prediction is based upon the misconception that the Fund will be forced to make enormous outlays in benefits which have not been planned for or contemplated by the Fund to any and all individuals attaining normal retirement age. Petitioners' arguments are mistaken in that they ignore the role that the participation, break-in-service and benefit accrual rules found in Sections 202, 203 and 204 of ERISA play in limiting the actual number of employees (and the size of

their accrued benefits) who would qualify to receive a benefit upon attaining normal retirement age. Petitioners' arguments are also greatly exaggerated in that they ignore the fact that most employees who attain normal retirement age with their contributing employer also have accumulated sufficient credited service to satisfy the requirements of their plan's preretirement vesting schedule and therefore already have obtained vested rights prior to attaining retirement age irrespective of the applicability of normal retirement age vesting. Furthermore, petitioners fail to mention that employer contributions will have been made on behalf of all employees who later obtain a vested pension benefit upon attainment of normal retirement age, and that these contributions will readily finance the rather insignificant amount of normal retirement benefits due this limited number of retirees.

It is therefore not necessary for this Court to review the well reasoned Second Circuit Court of Appeal decision as requested by petitioners herein.

POINT ONE.

UNDER BASIC CONCEPTS OF STATUTORY CONSTRUCTION, THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT PENSION RIGHTS VEST ON NORMAL RETIREMENT AGE WITHOUT REGARD TO LENGTH OF SERVICE.

A. The court's decision requiring the vesting of accrued benefits on normal retirement age is supported by the plain language of the statute.

Petitioners erroneously contend that the plain language of Section 203(a) of ERISA supports the position that vesting of pension benefits upon the attainment of normal retirement age is contingent upon the completion of a period of service.

The Court of Appeals, in a thoughtful analysis of the statutory language of Section 203(a) and Section 3(24), correctly held that a reading of the plain language of the statute clearly indicated that normal retirement age vesting differs substantively from preretirement vesting in that the completion of a specified period of service is not required for normal retirement age vesting as it is for preretirement vesting.

Petitioners mistakenly contend that the second "shall" contained in Section 203(a) refers to the normal retirement benefit and therefore requires that the normal retirement benefit must satisfy the additional vesting requirements set out in paragraph (1) and (2) of Section 203(a). Petitioners' understanding, however, defies and strains well accepted principles of grammer which clearly indicate that both the uses of the word "shall" in Section 203(a) are referring to those conditions that "each pension plan" must meet.

A correct grammerical reading of Section 203(a) supports the Court of Appeals understanding that "each pension plan""shall provide" normal retirement age vesting "and in addition""shall satisfy" the two additional vesting requirements set out in paragraph (1) and (2); that is, immediate 100% vesting of employee contributions, and pre-retirement vesting according to one of the three minimum vesting schedules established under Section 203(a)(2).

No where, in the vast provisions of ERISA, has Congress expressly attached a service requirement to the definition of "normal retirement benefit" as petitioners contend. Rather, "normal retirement benefit" is explicitly defined as:

> "...the greater of the early retirement benefit under the Plan, or the benefit under the Plan commencing at normal retirement age..."

Section 3(22), 29 U.S.C., Section 1002(22). Aforesaid definition of "normal retirement benefit" is clearly devoid of any mention of a service requirement.

Petitioners further contention that the Court of Appeals decision misinterprets the legislative history regarding Section 203(a) is completely unfounded and proves erroneous when one examines the Court of Appeals logical review and analysis of the pertinent committee reports.

B. The definition of normal retirement age does not incorporate a ten year service requirement.

The Court of Appeals decision regarding the intended meaning of the term "anniversary" found in the definition of normal retirement age under Section 3(24) of ERISA is well reasoned and explicitly rejected the strained construction that petitioners seek to give it.

In attempting to equate the term "tenth anniversary" with "ten years of service", petitioners offer several convaluted arguments.

First, petitioners erroneously argue that any amount of service - even one day - in each of ten consecutive years culminating in retirement after 65 is sufficient for vesting. Once again petitioners are mistakenly confusing preretirement vesting principles, such as length of service requirements, with normal retirement age vesting. If a plan participant attains normal retirement age, that is, he attains the latter of either age 65 of the 10th anniversary of the commencement of his participation in the Plan, while still in the employ of his contributing employer, he would indeed become vested in his accrued benefit at that time. However, the determination of whether the employee would actually

be a plan participant at the time of attaining normal retirement age and would have accumulated any accrued benefits is intricately tied into principles of covered service. Consequently, petitioners' example of an employee with one day of service in each of 10 consecutive years would result in the following: (a) since the employee only worked one day a year he would not meet the hour and year of service requirements found in the participation rules of the Plan and Section 202 of ERISA and hence would never qualify for participation in the plan; (b) no benefit would, in fact, accrue to the employee who worked only one day a year since he would not satisfy the minimum hour and year of service requirements found in the benefit accrual rules of the Plan and ERISA. Obviously, the employee who works one day a year and thereby fails to satisfy the participation and benefit accrual service rules would not have accumulated any accrued benefits, would not be a plan participant, and therefore would not qualify for a pension benefit at the attainment of normal retirement age. Petitioners' arguments concerning the definition of normal retirement age erroneously ignore the vital principles of participation and benefit accrual established by ERISA and should be rejected in light of the Court of Appeals well reasoned decision regarding the appropriate definition of normal retirement age.

Petitioners also contend that their argument that the term "10th anniversary" should be equated with "10 years of service" is supported by a Report of the Senate Committee which states that:

> "The Committee Bill takes the approach of being 'age neutral', which means that an employee's right to vested benefits depend solely on his years of service, rather than on some combination of service and age."

Sen. Rep. 93-383, 93d Cong., 2d Sess. (1974) reprinted in 1974 U.S. Code Cong. and AD News, 4890, 4931.

Petitioners however have taken the above-mentioned quotation out of context and fail to mention that the Report was referring to the age neutrality characteristics of the preretirement vesting schedules later adopted by Congress in Section 203(a)(2) of ERISA. The Senate Committee wanted, and the Congress later agreed to enact, preretirement vesting schedules that were age neutral; that is, vesting schedules that would depend on an employee's years of service and not on the age of the employee. Not in any sense can this Senate Report be said to ascribe to the contention that normal retirement age vesting should be service related.

Petitioners' further contention that the House Ways and Means Committee Report dealing with Section 206(a) of ERISA (which deals with the form and time of payment of benefits) is inconsistant with the Second Circuit Court of Appeals decision is also erroneous. The first quotation the petitioners cite from the aforementioned report highlights the parenthetical "the 10th anniversary of commencement of service". Petitioners cite the following language:

> "To insure that a participant can reasonably expect to receive his benefits during his retirement years, the committee bill requires a qualified plan (to which the basic vesting provisions apply) to commence payment of benefits to the participant...not later than ...(2) the 10th anniversary of the time the participant commenced participation in the plan...The second of the above alternatives (the 10th anniversary of commencement of service) is designed to permit a defined benefit plan to have an adequate period of time in which to fund the benefit for a person who first enters the plan at a relatively late age. H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code and Ad. News, 4670, 4735.

Petitioners mistakenly assume that the presence of the phrase "commencement of service" in the aforementioned parenthetical means that under Section 206(a) the term "10th anniversary" equates with the term "10 years of service". However, the use of the phrase "commencement of service" in the Report simply means commencement of participation, since one commences participation through service and vice-versa. This second quotation offered by petitioners and derived from the House Report once again offers nothing to support petitioners strained definition of the term "anniversary".

As opposed to petitioners' strained arguments, the Second Circuit Court of Appeals decision upholding the consistency of attributing the normal meaning of the term "anniversary" under both Section 206(a) and Section 3(24) of ERISA is well reasoned and supported by the Act's legislative history and purposes.

Finally, petitioners offer three (3) quotations from the Senate Finance Committee Report dealing with age - weighted minimum vesting proposals to support their argument that the Court of Appeals decision is directly in conflict with the express intent of Congress. However, even a light reading of the aforementioned Senate Finance Committee Report clearly reveals that the report concerns itself with the possible characteristics of the preretirement vesting schedules being proposed by the drafters of the statute. Some drafters wanted preretirement vesting schedules partially weighted to the age of employees, while other drafters wanted the preretirement vesting schedules to depend solely on the service of employees and not on their age, thereby being age-neutral. The preretirement vesting schedules found under Section 203(a)

(2) of ERISA are the result of the drafters' compromise decision to enact preretirement vesting schedules which are as age neutral as practicable. No where does the Senate Finance Committee Report even suggest that "anniversary" should be given the same meaning as the statutorily defined term "year of service".

POINT TWO.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS WHICH HAVE INTERPRETED THE STATUTE.

Petitioners contend that this Court has, on two recent occasions, discussed ERISA's vesting provisions, and has made no mention of normal retirement age vesting.

Petitioners cite Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980) as a recent decision which discusses ERISA's vesting provisions. Petitioners offer the following quotation from the Alessi decision:

> "...Congress, through ERISA, wanted to ensure that if a worker has been promised a defined benefit upon retirement -and if he has fulfilled whatever conditions are required to obtain a vested benefit-... he actually receives it.' (citations omitted) For this reason the concepts of vested rights and nonforfeitable rights, are critical to the ERISA scheme.

The petitioners, however, omit critical lanuage from the above quotation which conclusively demonstrates that the Court was discussing preretirement vesting in the Alessi decision; that is vesting where an employee has left employment prior to reaching normal retirement age.

In unedited from, this Court in Alessi stated:

> "Congress approved some delay in an employee's acquisition of a vested right to portions of

> his pension derived from employer contributions. Thus, ERISA specifies that this right could be hinged on a minimum length of service, but an employee reaching the minimum should not lose that right even if he does not continue working for that particular employer until reaching retirement age. That minimum period of service can be calculated under three different formulas, two of which permit gradual vesting of percentages of the accrued benefits over time. Compare 29 U.S.C. Section 1053(a)(2)(A) with Sections 1053(a)(2)(B),(C). (citations omitted) In essence, pension plans qualifying for tax treatment advantageous to the employer both must insure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring portions of the benefit derived from employer contributions to the employee should the employee leave the job before the normal retirement age. 29 U.S.C., Sections 1053 (a)(1), (2).

The emphasized language in the above quotation extracted from this Court's decision in Alessi clearly indicates that the Court was addressing the issue of service related vesting in the context of preretirement vesting; that is in the context of vesting where an employee has left employment prior to attaining normal retirement age.

The petitioners also refer to language found in footnote #10 of Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 366 to support their contention that this Court has held that all vesting must be related to service. However, the language found in footnote #10 of Nachman specifically refers to the functioning of Section 203(a)(2), the preretirement vesting requirements found in ERISA and makes no mention of the language found in Section 203(a) which establishes normal retirement age vesting.

In none of the above-mentioned quotations offered by petitioners is this Court concerned with the functioning of normal retirement age

vesting; that is in vesting where an employee retires upon the attainment of normal retirement age with his contributing employer. In Alessi, however, the Court clearly recognized the existance of normal retirement age vesting as a separate and distinct vesting requirement found in Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), when it immediately followed its discussion of preretirement vesting with the following statement:

> "Most critically, ERISA establishes that '[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age.' 29 U.S.C., Section 1053(a)."

This statement found in the Alessi decision demonstrates that petitioners are in error when they contend that this Court has failed to recognize normal retirement age vesting. In quoting directly from Section 203(a) of ERISA this Court has clearly recognized the existence of normal retirement age vesting.

Petitioners are correct in contending that in Alessi and Nachman the Court did not decide the issue of whether Section 203(a) requires vesting upon the attainment of normal retirement age without regard to service. Rather, in Alessi, this Court was confronted with the basic issue of whether a pension plan may reduce pension benefits by the amount of workers' compensation awards received subsequent to retirement. While, in Nachman this Court addressed the issue of whether former employees with vested interests in a pension plan that terminated a day before much of ERISA became fully effective were covered by the insurance program of the Pension Benefit Guaranty Corp. under Title IV

of ERISA notwithstanding a provision in the plan limiting their benefits to the assets in the pension fund.

Petitioners also mistakenly cite three Federal Circuit Court of Appeals decisions to support their argument against normal retirement age vesting without regard to service.

In VanFossan v. International Brotherhood of Teamsters, 649 F.2d 1243, 1246 (7th Cir. 1981) the 7th Circuit Court of Appeals, in discussing the provisions of Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), stated:

> "That section provides that: 'an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and ...' in the case of an employer contribution plan, if an employee 'has at least ten years of service...' or 15 years of service, depending on the nature of the plan." (emphasis added) VanFossan v. International Brotherhood of Teamsters, 649 F.2d 1243, 1246 (7th Cir. 1981).

The above-mentioned quotation with use of the word "and" demonstrate that the 7th Circuit recognize in VanFossan two separate vesting requirements, normal retirement age vesting independent of any service requirements and preretirement age vesting based upon designated years of service under the plan. A more detailed treatment of the vesting requirement of Section 203(a) of ERISA, and especially the normal retirement age vesting requirement, was probably not offered by the 7th Circuit Court of Appeals in VanFossan because: VanFossan dealt solely with an employee who left covered employment prior to attaining normal retirement age, hence with preretirement vesting, and not with normal retirement age vesting; and VanFossan involved a situation where the Court found that

ERISA was inapplicable because the circumstances involved occurred prior to January 1, 1976, the effective date of the vesting provisions found in Section 203(a) of ERISA.

Petitioners also contend that language found in the 8th Circuit Court of Appeals decision in Hepple v. Roberts Dybdahl, Inc., 622 F. 2d 962, 964-965 (8th Cir. 1980), supports their contention that normal retirement age vesting, independant of any service requirement, does not exist as a separate vesting requirement under Section 203(a). Petitioners extract the following language from the Hepple decision to support their arguement:

> "Under the kind of plan involved in this case which provides for 100 percent vesting of employer's contributions after 10 years of covered service, there is no requirement in the statute for vesting of any lesser percentage of benefits before the required 10 years of service." Hepple v. Roberts Dybdahl, Inc. 622 F. 2d 962, 964-965 (8th Cir. 1980)

Petitioners, however, fail to note that the Hepple case solely involved preretirement vesting rights; that is, with the vested rights of an employee who left employment prior to attaining retirement age. In Hepple, the 8th Circuit Court of Appeals was presented with the issue of whether a pension plan provision for forfeiture of employer contributions for the benefit of employees with less than 10 years of service who later compete with the employer, in violation of the forfeiture clause, was void as a prohibited forfeiture of vested rights in violation of ERISA. The Court ruled that the forfeiture clause was permissable since it applied only in a situation where the competing employee left employment prior to retirement and with less than 10 years of credited

service, and before satisfying the 10 year minimum vesting requirement adopted by the plan as its preretirement vesting schedule.

Even though vesting upon attainment of normal retirement age was never at issue in the Hepple case, the 8th Circuit Court of Appeals did recognize normal retirement age vesting as a separate and distinct vesting requirement found under Section 203(a), along with preretirement vesting and automatic 100 percent vesting in employee contributions. In clearly identifying the separate existance of normal retirement age vesting, the 8th Circuit stated:

> "It is undisputed that the plan involved in this action meets these minimum requirements (the minimum vesting requirements of Section 203(a) of ERISA). It provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age, that an employee's own contributions are nonforfeitable, and that an employee with at least 10 years of service has a nonforfeitable right to 100 percent of his benefits from employer contribution.' (emphasis added) Hepple v. Robert Dybdahl, Inc. 622, F. 2d 964 (8th Cir. 1980)

Petitioners also contend that language contained in the 9th Circuit Court of Appeals decision in Hernandez v. Southern Nevada Culinary & Bartenders Trust, 662 F. 2d 617, 619-620 (9th Cir. 1981) is supportive of their argument against normal retirement age vesting independent of a service requirement. Petitioners provide the following quotation from Hernandez:

> "ERISA's minimum vesting provisions require only that, once an employee-participant satisfies his pension plan's length of service requirements, his right to receive his vested pension benefits matures on his reaching the normal retirement age contained in the plan." Hernandez v. Southern Nevada Culinary & Bartenders Trust, 662 F.2d (9th Cir. 1981)

However, petitioners fail to reveal or explain the following language found in the 9th Circuit Court of Appeals decision in Hernandez:

> "ERISA's minimum vesting standards are contained in Section 1053(a), which provide in relevant part: 'each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age and in addition ...an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefits derived from employer contribution.'"

The aforesaid quotation outlining the minimum vesting requirements of Section 203(a) of ERISA contained in the Hernandez decision clearly demonstrates the 9th Circuit Court of Appeals' recognition of the normal retirement age vesting requirement established by ERISA.

Petitioners also fail to mention that in Hernandez the 9th Circuit Court of Appeals was confronted with an issue entirely unrelated to the issues presented in the matter at hand. In Hernandez, the 9th Circuit was presented with the issue of whether, under ERISA, the widow of an employee who has elected a "joint and survivor annuity option", and whose right to receive "accrued benefits" has become vested, is entitled to receive those benefits after his death, even though the employee died prior to reaching the normal retirement age under the Plan, and , thus, never commenced receiving any benefits. The Hernandez decision is clearly unrelated to the present matter since the 9th Circuit Court of Appeals was confronted with the situation where an employee had died prior to reaching normal retirement age and therefore with the issue of the applicability of a "joint and survivor annuity option" to such situation.

The VanFossen, Hepple and Hernandez case decisions therefore demonstrate that other courts, such as the 7th, 8th and 9th Circuit

Court of Appeals have recognized normal retirement age vesting as a separate and distinct vesting requirement found under Section 203(a) of ERISA, a vesting requirement independant of any service requirement as found under the pre-retirement vesting schedule of aforesaid section.

Furthermore, petitioners argue that in Janowski v. Teamsters Local No. 710 Pension Fund, 673 F. 2d 931 (7th Cir. 1982), the 7th Circuit Court of Appeals has found that Section 3(24) of ERISA, and the identical provision in the Internal Revenue Code, 26 U.S.C. Section 411(a)(8), in defining normal retirement age, incorporates within it a 10 year service provision.

In Janowski the Court stated:

> "Section 411(a)(8) defines normal retirement age as the earlier of: (A) the time a Plan participant attains normal retirement age under the Plan, or (B) the later of the time a Plan participant attains 65 or accumulates 10 years of credited service. 26 U.S.C., Section 411 (a)(8)." Janowski v. Teamsters Local No. 710 Pension Fund, 673 F.2d 936 (7th Cir. 1982)

This quotation, however, is then followed two sentences later with the arguments of the pension plan trustees as to the reading of Section 26 U.S.C. Section 411(a)(8):

> "In contrast, the trustees read Section 411 (a)(8) to permit them to designate any age as normal retirement age, subject to the limitations that it cannot be later than the day the participant attains age 65 unless the participant has not accumulated 10 years of credited service, in which case the participant reaches normal retirement age after 10 years of credited service." Janowski v. Teamsters Local No. 710 Pension Fund, 673 F. 2d 936 (7th Cir. 1982)

From the above quotation it is apparent that the 7th Circuit, in including a 10 year service requirement in the definition of normal retirement age, simply recited the interpretation of Section 411(a)(8) held by the pension plan trustees without actually offering a substantive ruling on the precise definition of the term "10th anniversary" found under 26 U.S.C., Section 411(a)(8)(B)(ii).

Moreover, in Janowski, the 7th Circuit Court of Appeals was never called upon to rule on the meaning to be given to the term "10th anniversary" as found in the definition of normal retirement age. Rather, the issue before the court in Janowski was whether age 65 was permissibly chosen as a normal retirement age under a new plan as amended to conform to ERISA even though age 57 was the normal retirement age under the prior plan. As is apparent, the 7th Circuit in Janowski was faced with an issue entirely unrelated to the issue of whether Section 203(a) of ERISA authorizes normal retirement age vesting independant of any service requirement and whether the language "10th anniversary", found under Section 3(24) of ERISA, equates with the term "10 years of service". These latter questions have only been directly and substantively addressed by the Second Circuit Court of Appeals, in the matter at hand, and by the three Federal Tax Court cases cited in the Second Circuit decision; Board of Trustees of New York Hotel Trades Council & Hotel Association of New York City, Inc. Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 597, Caterpillar Tractor Company v. Commissioner, 72 T.C. 1088, (1979) and Trustees of the Taxicab Industry Pension Fund v. Commissioner, (1981), T.C.M. (CCH), Para. 651. The 7th Circuit Court of Appeals decision in Janowski is not dependant upon any particular interpretation of Section 203(a) of ERISA as are the aforementioned decisions of the

Federal Tax Court and the Second Circuit Court of Appeals. Therefore the 7th Circuit's decision is not in any sense in decisional conflict with the Second Circuit Court of Appeals opinion which directly addresses and rules on the proper structure and functioning of the minimum vesting requirements found under Section 203(a) of ERISA. Moreover, the 7th Circuit Court of Appeals dicta in the Janowski case, which discusses the meaning of "normal retirement age", is not in any manner fundamental to the Court's holding in the case and does not represent a decisional conflict among the Federal Circuit Courts warranting this Court's review.

POINT THREE.

THE PURPOSE OF ERISA IS SERVED BY THE SECOND CIRCUIT's DECISION.

The Second Circuit Court of Appeals decision addresses and serves the goals of reducing the unwarranted loss of pension benefits while maintaining the financial integrity of pension plans.

Petitioners' contention that the Court of Appeals decision would jeopardize the actuarial soundness of employee benefit funds is erroneous for numerous reasons.

Petitioners once again ignore the quite substantial role that the service requirements of the benefit accrual and participation rules of ERISA, as adopted by each particular pension plan, play in limiting the actual number of employees who could expect to receive a normal retirement benefit upon attaining normal retirement age. Petitioners, by focusing narrowly on the preretirement vesting requirements of ERISA, portray a distorted picture of legions of employees qualifying for normal retirement pension benefits solely because of the Second Circuit Court of Appeals decision. This simply is not the case. There are very few

employees that can be expected to obtain a normal retirement benefit by attaining normal retirement age while failing to actually acquire enough credited service to meet the requirement of the plan's preretirement vesting schedule. Most employees who attain normal retirement age while still in the employ of their contributing employer will be found to have worked for a period of time sufficient to satisfy any applicable preretirement vesting schedules.

For those employees who fail to accumulate enough credited service to meet the service requirements of their plan's preretirement vesting schedule, their failure is almost always due to their leaving employment prior to reaching retirement age. The Second Circuit Court of Appeals decision has no affect whatsoever on these employees who leave employment prior to retirement age. The Second Circuit's decision can only affect the relatively small number of employees who attain normal retirement age with their contributing employer while falling short of the service requirements of their plan's preretirement vesting schedule. Petitioners' fear of financial instablility attributed to the Second Circuit Court of Appeals decision simply defies reality.

Petitioners also erroneously argue that the Court of Appeals decision jeopardizes the financial soundness of the Fund because it eliminates certain "gains" that are necessary to meet the Fund's liabilities. These "gains" are identified as all those contributions coming into the Fund and made on behalf of participants who leave employment prior to the completion of 10 years of service. Petitioners note that, since these participants leave employment prior to satisfying the preretirement vesting schedule's requirement of 10 years of credited service, the contributions made on their behalf stay in the Fund as gains

to be used to offset liabilities. But once again petitioners fail to recognize that the aforesaid "necessary gains" are mostly obtained from the lost benefits of employees who leave employment prior to attaining retirement age. Hence, since the Second Circuit Court of Appeals decision does not apply to those vast numbers of employees who leave employment prior to retirement age, petitioners fail to recognize that the Second Circuit's decision will have little if any effect on reducing the so-called "necessary gains" that the Fund has come to rely on.

Moreover, petitioners ignore the fact that, for those few employees who do not satisfy a preretirement vesting schedule yet qualify to receive a pension because of their attainment of normal retirement age during employment, contributions will have actually been made to the Fund on behalf of these employees. Contributions will therefore exist to finance there normal retirement age benefits. Hence, these few employees who attain a normal retirement age benefit will not in any manner prove a drain on the Fund's assets nor place the Fund at a position of financial instability.

CONCLUSION.

The decision of the Second Circuit Court of Appeals is well reasoned and properly interprets the legislative history and purposes of ERISA. Moreover, the Court of Appeal's opinion is the first Federal Court ruling on the interpretation and interplay of Section 203(a) and Section 3(24) of ERISA, besides the three Federal Tax Court decisions as aforementioned, and is not in decisional conflict with any other Federal Circuit Court or U. S. Supreme Court decisions.

In light of the foregoing the petitioners' application for a Writ of Certiorari fails to reveal any questions concerning important matters of federal law which have a significant impact, thereby warranting this Court's attention. Therefore, respondent respectfully requests that this Court deny the Petition for Certiorari and refuse jurisdiction of this case.

Respectfully submitted,

FRANK J. DOLCE
Counsel of Record
COLLINS, COLLINS & DI NARDO, P.C.
415 Franklin Street
Buffalo, New York 14202
Tel. No. (716) 854-8195

NO. 82-1118

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
APR 12 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCA F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

CLARA DUCHOW, the respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court, and to file herein her response to the Petition for Certiorari to the United States Court of Appeals for the Second Circuit filed by petitioners in single counterpart, without printing the same. The typed Brief of Respondent in Opposition is presented herewith for filing.

The affidavit of respondent in support of this motion is filed herewith.

DATED: April 8, 1983

Respectfully submitted,

BY: _____
FRANK J. DOLCE, ESQ., of counsel for respondent

Collins, Collins and D'Amato, P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

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OCTOBER TERM, 1982

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCA F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirment Fund,

Petitioners

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ERIE : SS:
CITY OF BUFFALO)

CLARA DUCHOW, being duly sworn deposes and says:

1. She is the respondent in the above-entitled action and makes this affidavit in support of her motion for leave to proceed in forma pauperis herein.

2. Affiant is unable because of her poverty to pay fees and costs of this case or give security therefor.

3. This is an appeal from final judgment of United States Court of Appeals for the Second Circuit and involves substantial questions of federal law, as more fully set forth in Appellant's jursidictional statement. Affiant believes that she is entitled to respond to petitioners' application for Writ of Certiorari before this Court.

Collins, Collins and D'Amato P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

Clara Duchow

Subscribed and sworn to before me
this 8th day of April, 1983.

FRANK J. DOLCE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 84

TE OF NEW YORK
U.S. SUSPREME COURT : COUNTY OF

Index No.

W YORK STATE TEAMSTERS CONFERENCE PENSION D RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, LLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCA F. PERNO, MACK CANZONERI, VICTOR MOUSSEAU, and UL BUSH, as Trustees of the New York State amsters Conference Pension and Retirement Fund

Petitioners

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ARA DUCHOW, Individually and as Administratrix the Estate of HERMAN DUCHOW, Deceased

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS & SUPPORTING AFFIDAVIT

ORIGINAL

Index No.

COLLINS COLLINS & DiNARDO, P.C.
ATTORNEYS FOR Respondent

OFFICE POST OFFICE ADDRESS AND TELEPHONE
415 FRANKLIN STREET
BUFFALO, NEW YORK 14202
(716) 854-8195

PLEASE TAKE NOTICE that an *, of which the within is a copy,*
uly granted in the within action on the *day of* *, 19* *, and duly entered in the office of the Clerk*
County of *on the* *day of* *, 19* .

Yours, etc.,
COLLINS, COLLINS & DiNARDO, P.C.
ATTORNEYS FOR

DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this *day of* *,19*
Attorney(s) for

TE OF NEW YORK
NTY OF } ss.:
OF

, being duly sworn deposes and says: that deponent is not a party to this action and is over 18
of age; that on the *day of* *, 19* *, deponent served the within*
upon,

action, at the above address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid rly addressed wrapper, in a official depository under the exclusive care and custody of the United States post office department within the of New York

n before me, this *day of* *, 19* .

My commission expires
Public, Erie County, N.Y.; Commissioner of Deeds, Buffalo, N.Y.

STATE OF NEW YORK)
COUNTY OF ERIE : SS:
CITY OF BUFFALO)

I, JONI MEIER, depose and sy that I am a legal secretary/ paralegal in the office of COLLINS, COLLINS & DI NARDO, P.C., attorneys of record for CLARA DUCHOW, respondent herein, and that on April 8th, 1983, pursuant to Rule 28, Rules of the Supreme Court, I served one (1) copy of the Respondent's Motion for Leave to Proceed in Forma Pauperis, on each of the parties required to be served herein, as follows:

On THOMAS J. HART, Counsel of record, LIPPMAN & HART, herein by mailing the copy in a duly addressed envelope, with first class postage prepaid, to THOMAS J. HART, counsel of record for said petitioners at his office at Suite 220, 1801 K Street, N.W., Washington, D.C. 20006;

On PETER P. PARAVATI, P.C., attorney for petitioners herein by mailing a copy in a duly addressed envelope, with first class postage prepaid, to PETER P. PARAVATI, P.C, attorneys for petitioners at his office at 217 Ruger Street, Utica, New York 13501-3687.

All parties required to be served have been served.

Joni Meier
LEGAL SECRETARY/PARALEGAL

Subscribed and sworn to before me
this 8th day of April, 1983.

FRANK J. DOLCE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 84